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IN THE

Supreme Court of the United States

OCTOBER, TERM, 1973

72-1541

No. A-1024

SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN,
Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8722

TABLE OF CONTENTS

	Page
Proceedings Below	1
Jurisdiction	2
Questions Presented	3
I. In A Suburban School District Which Has Never Maintained A Dual System, Where Each Student Attends The Closest Elementary School, (With Minute Exceptions) And All Students Attend the Same Junior and Senior High Schools, Is There Unlawful Racial Discrimination In Violation Of Title VI Of The Civil Rights Act of 1964 (42 U.S.C. §2000-d) Because One Of Ten Elementary Schools Has A Student Body Which Reflects The All-Black Racial Composition of the Neighborhood It Serves?	3
II. Where Charges Of Racial Discrimination By A Suburban School District Rest On Alleged Residential Racial Discrimination By Private Persons, Other Local Governmental Bodies, And The United States, Not Parties To An Administrative Proceeding, Does The Admission Of Evidence Relating To Such Third Party Discriminatory Practices And Policies Constitute Prejudicial Error Which Bars Such Evidence From Being Considered "Substantial Evidence"?	3

Page

III. Is It Improper For The Department of Health, Education And Welfare To Withhold Federal Funds Allocated For Secondary Education In A School District Where Administrative Findings Of Fact And Conclusions Of Law Show No Causal Connection Between The Alleged Segregation At A Single Elementary School And The Use Of Said Federal Funds In The Integrated High School And Junior High School of Said District? 3-4

Statement of the Case 4

Reasons for Granting the Writ 9

Summary 17

APPENDIX

The Following Orders, Rulings And Decisions Are Unreported, And Are Set Forth In The Accompanying Appendix In Full:

Initial Decision

Administrative Proceeding In The Department of Health, Education and Welfore, National Science Foundation, Proceedings Under Title VI Of The Civil Rights Act of 1964, Docket No. CR-186, Rendered: September 28, 1970, In Washington, D.C. by Horace H. Rogers, Hearing Examiner 1a

Ruling on Exceptions and Order of the Reviewing Authority (Civil Rights) Page

Administrative Proceeding In The Department of Health, Education and Welfare, National Science Foundation. Docket No. CR-866. Rendered: September 29, 1971 in Washington, D. C. By Oliver Morse and Irivng Ferman, With Specially Concurring Opinion By Edward A. Potts, And William F. Able, With Dissenting Opinion By William F. Able. 53a

Order of the Secretary

Administrative Proceeding In The Department Of Health, Education And Welfare, National Science Foundation. Docket No. CR-866. Rendered: April 18, 1972 in Washington, D. C. By Elliot Richardson, Secretary of Health, Education And Welfare.. 95a

Order Delaying Termination of Funds

Letter Of Elliott Richardson, Secretary of Health, Education And Welfare To Burton R. Shifman, Attorney For School District Of The City of Ferndale, dated May 22, 1972. ..... 97a

Order

United States Court Of Appeals For The Sixth Circuit. Case No. 72-1512. Before Weick, Edwards and Wilson. Filed: March 1, 1973. ..... 98a

TABLE OF CASES

Cases:	Page
Deal v. Cincinnati, Board of Education, 419 F.2d 1387 (6th Cir. 1969) Cert. Denied, 91 S.Ct. 1630	16
Northcross v. Board of Education of City of Memphis, Tenn., 302 F.2d 818 (6th Cir. 1962) Cert. Denied, 370 U.S. 944	16
Swan v. Charlotte-Mecklenburg Board of Education, 402 U.C. 1 (1971)	12-15
Statutes:	
5 U.S.C. § 706	11
42 U.S.C. § 2000-d	3
Miscellaneous:	
New York Times, April 18, 1973, Section L, page 61	15

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PROCEEDINGS BELOW

This Petition for Writ of Certiorari is filed in order to obtain a review of *School District of the City of Ferndale, Michigan v. Department of Health, Education and Welfare,* — F.2d —, Case No. 72-1512 (6th Cir. 1973). That order upheld the order and decision of the Department of Health, Education and Welfare terminating fed-

eral financial assistance to the School District of the City of Ferndale, Michigan for violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000-d. No federal funding will be available to the school district until the Department of Health, Education and Welfare approves a plan to desegregate one elementary school in said school district.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit was filed on March 1, 1973, affirming the Order of the Department of Health, Education and Welfare.

A Petition for Rehearing was submitted to the Court of Appeals for the Sixth Circuit on March 14, 1973 and was denied on April 2, 1973.

On April 12, 1973, Mr. Justice Potter Stewart, entered an Order Extending Time to File Petition for Writ of Certiorari in this cause, to and including May 16, 1973.

The Supreme Court of the United States has jurisdiction to review the Order of the Court of Appeals for the Sixth Circuit by virtue of 28 U.S.C. §1254.

QUESTIONS PRESENTED

I. IN A SUBURBAN SCHOOL DISTRICT WHICH HAS NEVER MAINTAINED A DUAL SYSTEM, WHERE EACH STUDENT ATTENDS THE CLOSEST ELEMENTARY SCHOOL, (WITH MINUTE EXCEPTIONS) AND ALL STUDENTS ATTEND THE SAME JUNIOR AND SENIOR HIGH SCHOOLS, IS THERE UNLAWFUL RACIAL DISCRIMINATION IN VIOLATION O FTITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. §2000-d) BECAUSE ONE OF TEN ELEMENTARY SCHOOLS HAS A STUDENT BODY WHICH REFLECTS THE ALL-BLACK RACIAL COMPOSITION OF THE NEIGHBORHOOD IT SERVES?

II. WHERE CHARGES OF RACIAL DISCRIMINATION BY A SUBURBAN SCHOOL DISTRICT REST ON ALLEGED RESIDENTIAL RACIAL DISCRIMINATION BY PRIVATE PERSONS, OTHER LOCAL GOVERNMENTAL BODIES, AND THE UNITED STATES, NOT PARTIES TO AN ADMINISTRATIVE PROCEEDING, DOES THE ADMISSION OF EVIDENCE RELATING TO SUCH THIRD PARTY DISCRIMINATORY PRACTICES AND POLICIES CONSTITUTE PREJUDICIAL ERROR WHICH BARS SUCH EVIDENCE FROM BEING CONSIDERED "SUBSTANTIAL EVIDENCE"?

III. IS IT IMPROPER FOR THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

TO WITHHOLD FEDERAL FUNDS ALLOCATED FOR SECONDARY EDUCATION IN A SCHOOL DISTRICT WHERE ADMINISTRATIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOW NO CAUSAL CONNECTION BETWEEN THE ALLEGED SEGREGATION AT A SINGLE ELEMENTARY SCHOOL AND THE USE OF SAID FEDERAL FUNDS IN THE INTEGRATED HIGH SCHOOL AND JUNIOR HIGH SCHOOL OF SAID DISTRICT?

STATEMENT OF THE CASE

The School District of the City of Ferndale, Michigan serves several suburban communities adjacent to the City of Detroit, Michigan, including most of the City of Ferndale, all of Pleasant Ridge, part of the City of Oak Park and a portion of Royal Oak Township. The population of the School District is 38,000-39,000. There are ten elementary schools, one high school and one junior high school serving the District. Among these ten elementary schools, one, the U.S. Grant School, has a student enrollment which is 100% black. No other school within the system has more than a 10% black enrollment.

When the District was created there were few blacks living in the area. It was not until the 1920's that blacks began moving into the area served by the Grant School.

In 1921, five years prior to the construction of Grant, the school board adopted a neighborhood school plan where each student was to attend the nearest neighborhood school. This plan has been continually and uniformly ap-

plied to all students to the present date, except for handicapped children.

During the period 1920 to 1930, the District population increased from 2,640 to 20,855, mostly due to the high demand for industrial workers created by the automobile industry. In response to this population boom, the School District embarked upon a program of school construction to accommodate the concomitant increase of school age children.

In 1924, the Jefferson Elementary School was constructed, and opened in the Fall of 1925 with an enrollment of 297 students. Based upon the continued increase in residential population, the Board decided, in November, 1925 to construct the Grant School. The location of this facility, more than one-half mile south of the Jefferson School, was chosen to ameliorate complaints about walking distance and the condition of streets used to reach the Jefferson School. At the time this decision was made, there was no foreseeable concentration of black residents in the area to be served by Grant. Grant opened in 1926 with an initial enrollment of 124 students who had previously attended Jefferson. From 1925–1950 the capacity of the Jefferson School was 460-480 students. The combined enrollment of Jefferson and Grant in 1927 totaled 490 students, indicating the overcrowding which would have plagued Jefferson had Grant not been built.

From 1926 to 1952 the only white teachers at Grant were "circuit teachers" who visited the school several hours per week for special classes, such as art and music. Since 1952, however, more white teachers have been assigned to Grant and at the time this action was commenced, there were 10 white teachers out of a total full time faculty of 23 (Tr 1322 A).

During the years 1940–1950 the Grant School became overcrowded due to a greater than expected population influx. In order to alleviate this problem, the Board requested and obtained federal funds for the construction of an addition to Grant. This was accomplished in 1945. It was testified by one of Respondent's expert witnesses that the decision to expand Grant was as educationally valid as a decision as would have been a decision to transfer Grant students to other elementary schools (Tr 494 A, 952 A, 954 A).

In April of 1969, the Department of Health, Education and Welfare filed allegations that the District had constructed and maintained the Grant School in violation of Title VI of the Civil Rights Act of 1964 and the Regulations of the Department of Health, Education and Welfare (45 CFR, Part 80, as amended).

Lengthy hearings were held both in Detroit, Michigan and Washington, D.C., where hundreds of pages of testimony and thousands of pages of exhibits were admitted. At the hearings, Respondent presented numerous witnesses whose testimony related specifically to matters outside the purview of the hearing. Over Petitioner's strenuous and continual objection, testimony and exhibits relating to private real estate practices, Federal Housing Administration policies, restrictive covenants, private racial attitudes, and governmental zoning policies were admitted. At one point, Petitioner requested time to file an interlocutory appeal with regard to the overruling of its objections to this evidence, and was denied the time to do so. A great bulk of the record made at such hearings is comprised of this type of testimony, which Petitioner contends would have been clearly inadmissible in a United States District Court, and was therefore highly prejudicial to its case.

Subsequent to the filing of briefs by counsel and oral argument, the Hearing Examiner delivered his Initial Decision finding the Petitioner in violation of Title VI of the Civil Rights Act of 1964. In this Decision, the Hearing Examiner stated:

> "However, while the evidence is sufficient to find that racially motivated actions of private persons and political entities other than the School District were the principal cause of the *residential* racial segregation herein, the Examiner will not find (as proposed by General Counsel) that such "de jure" residential segregation in and of itself creates a *de jure* segregation of the public schools where the student assignment system is based on the segregated residential pattern." (Tr 331 A; App. 5a)

The Department's Reviewing Authority (Civil Rights) and the Secretary of Health, Education and Welfare, by virtue of his discretionary decision not to review the case, affirmed the decision of the Hearing Examiner. In its discussion of the law, the majority of the Reviewing Authority set forth the standards which it applied to the case:

> "For us this is a case of first impression in that at no time in its history was the Respondent School District compelled by law to separate the races in its system. On the contrary, the record suggests that the state law prohibited segregation in the education of its citizens.
>
> The question presented by this proceeding does not deal with the legal responsibility of a school district to dismantle a formerly required dual school system and thereby eliminate all vestiges thereof by establishing a unitary system. Moreover, the traditional concept of "*de jure* segregation" as designated and applied to those school systems formerly required by law to segregate is not applicable

to the facts herein. What is in issue here is what conduct of a school district, through its appropriate agents, constitutes a violation of its school children's constitutional rights, even though such conduct is not compelled by law. In turn, a response to this issue calls for an examination of the interpretation and application of the concept of "*de jure* segregation".

In addition to the alleged segregatory establishment and maintenance of one of the Respondent's elementary schools, and the assignment practices regarding its faculty, the Government's case against the Respondent is based upon the alleged concurrent discriminatory acts of entities and persons other than the Respondent. Coupled with this is the fact that there exists no law requiring the Respondent to conform or capitulate to the alleged discriminatory acts of others in the establishment, operation, or maintenance of its school system. Consequently, we are called upon by the Government to consider two sources of alleged discriminatory conduct: One, conduct of Respondent itself; and two, conduct of those other than the Respondent. This in turn, poses two questions: One, under what circumstances can we consider conduct of a school district as constitutionally impermissible; and two, under what conditions does the discriminatory conduct of others become relevant and cogent to the dispostions in a proceeding such as this?" (Tr. 495 A-496A; App. 56a-57a).*

It was the ultimate finding of the Reviewing Authority, which has been affirmed by the United States Court of Appeals for the Sixth Circuit, that:

> " . . . the alleged discriminatory conduct of others, public or private, becomes or is relevant to determine whether Respondent School District has by its official actions and educational policy pur-

> posefully participated in, contributed to or accommodated such conduct. As such, the evidence objected to by Respondent herein was relevant to the previously announced theory of the Government's case; to-wit, that Respondent through its official actions and policies conformed with the alleged discriminatory actions and policies of the other political bodies within its District." (Tr 495 A, App. 80a)

In affirming the decision of the Department of Health, Education and Welfare, the United States Court of Appeals held that the record disclosed "substantial evidence" to find Petitioner in violation of the Civil Rights Act of 1964.

REASONS FOR GRANTING THE WRIT

Population shifts from central cities and rural areas to suburbs create conditions dissimilar to those dealt with in previous decisions of this Court in the area of school desegregation. In large cities where dual school systems did not exist, it was and is possible for black students to attend school from kindergarten to high school with all black schoolmates without any action by the school districts involved to have caused this result.

Most suburban school districts in the United States will have one or two high schools at the apex of a system of school organization which would have one to four junior high schools and about a dozen elementary schools. In such school systems, it is very difficult, if not impossible, to find the pattern of school attendance that has been previously described as occurring in central cities.

The School District of the City of Ferndale, Michigan is an example of a typical suburban school district. All students attend the single high school, attend the single junior high school and attend one of the ten geographically delimited neighborhood elementary schools. As a result of the single high school and single junior high school, every student receives not less than six years of completely integrated education with the majority of students receiving thirteen years of integrated education. As a result of the neighborhood attendance policy established in 1921 an all-black attended elementary school, the U. S. Grant School, located in Royal Oak Township, exists. The action of the Department of Health, Education and Welfare, if upheld, establishes precedent for a policy which indicates that under such circumstances an elementary school populated entirely by blacks is a deprivation of constitutional rights.

In the instant case, the nexus of the Department's findings is that the U.S. Grant School was located for the purpose of becoming an all-black school. This creates a dilemma for suburban school districts, which, in order to provide equal protection of the law for all of their elementary school age children, must locate elementary schools in a regular, ungerrymandered geographic pattern so that no student is put to a greater burden to reach school than any other. Under the finding by the Department of Health, Education and Welfare, locating a school which becomes attended by black students exclusively, becomes an act of discrimination causing the termination of federal funding.

The issues involved in this case were not considered by the Court of Appeals for the Sixth Circuit or so it appears from a reading of the Court's order. The Court of Appeals based its decision on the standard of review set

forth in the Administrative Procedure Act, 5 U.S.C. §706 where it is stated:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. *The reviewing court shall—*
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) *hold unlawful and set aside agency action, findings, and conclusions found to be—*
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) *unsupported by substantial evidence in a case* subject to sections 556 and 557 of this title or *otherwise reviewed on the record of an agency hearing provided by statute;* or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L.89-

554, Sept. 6, 1966, 80 Stat. 393." (Emphasis supplied)

The evidence contained in the record which touched the issue of creation of a black residential neighborhood was evidence which dealt with discriminatory practices in residential housing by private persons and institutions, local governments, other than the school district, and the United States of America and its agencies. This evidence was strenuously objected to by Petitioner, since none of the parties alleged to have caused the residential racial discrimination was a party to the administrative proceedings but such evidence was nevertheless admitted, and, by a reading of the Hearing Examiner's Initial Decision, colored the determination reached.

The problem that now faces this School District and all others similarly situated which do not and have not bussed school children is whether they may locate a school so as to provide equality of opportunity for attendance by minimizing the walking distance if the result of such policy is to create a racially identifiable school.

In *Swan v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court set forth the thrust of the cases since Brown I:

> "We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from Brown I to the present was the dual school system. *The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond*

> *the jurisdiction of school authorities.*" 402 U.S. at 22. (Emphasis supplied)

Other language, in *Swan* further limiting the scope of this Court's mandate indicates the flexible approach which must apply to racial balance in schools:

> "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24.

The logical corrollary accompanying a premise such as this is that a unitary, integrated school system may have schools in which the racial composition does not reflect the ratio of blacks to whites in the community as a whole. Questions remain unanswered, however, as to what level and under what conditions will this racial separation be constitutionally permissible.

The instant case presents these questions to the Court, in addition to the query: May the culpability of a school district for racially identifiable school extend to actions and policies of persons and entities "beyond the jurisdiction of school authorities?"

By holding that:

> " . . . the course of conduct of the School Board was consistent with the pattern of private discrimination and adjuvant public action, that created and maintained racially separate black and white residential neighborhoods, and that the residential segregation and the school segregation each supported the other." (Tr 331 A; App. 5a)

the primary assumption adopted by the Hearing Examiner was that the racial composition of the various neighbor-

hoods in the Ferndale District had been determined by discriminatory motives and actions of private and public forces. However, nowhere in the proceedings has the burden of overcoming allegations of discrimination fallen on anyone other than the School District. The compulsion to defend the actions of others in addition to its own policies was clearly an excessive burden upon Petitioner given the nature of the proceedings. Since there has been no conclusive finding of residential discrimination, but merely an evidentiary indication of its possible existence, a finding that Petitioner acted in conformity therewith is based on a speculative and procedurally improper foundation.

Assuming, *arguendo*, that the residential area served by the Ferndale School District is racially segregated by reasons other than unlawful discrimination (which has never been contended by Respondent) the crucial question to be answered is whether the existence of one all-black elementary school which reflects that residential segregation is sufficient for a violation of the Civil Rights Act. A pragmatic approach to the problem will reveal that even those racially identifiable schools which under the *Swan* rationale are constitutionally permissible, have been at some time in their history, influenced by discriminatory motivations. What the Court seems to have said in *Swan* is that where a history of discrimination has influenced the current ratio of blacks to whites in a local school system, all vestiges of this historical discrimination cannot be pragmatically eliminated, nor can the responsibility for its eradication be placed in the hands of the local school authorities. Even in those districts, such as Charlotte-Mecklenburg, where historically the system had been dual, the mandate of *Brown* to dismantle did not mean the complete

eradication of racially identifiable schools.[1] Although the Court indicated that such one-race schools demand close scrutiny,[2] it must be remembered that this concept was discussed in the context of a remedy case, where there was an acknowledged history of state-imposed segregation and the District had submitted a plan to convert the formerly dual system to a unitary one.

Certainly, therefore, in a district with no historical pattern of segregated facilities no greater degree of racial homogeneity should be required.

The instant case is the first of what portends to be a long line of cases being brought by the Department of Health, Education and Welfare under Title VI of the 1964 Civil Rights Act, against urban-suburban districts.[3] In those districts where racially identifiable schools are alleged to have been established and maintained in conformity with racial patterns in residential housing caused by private and public discrimination, specific guidelines are necessary to separate the issues of residential discrimination and school discrimination. If the alleged school segregation is said to rely upon and be encouraged by such outside factors, a conclusive determination of their existence must be required as a prerequisite to a finding of

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[1] The Court in *Swan* stated:

". . . it should be clear, that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." 402 U.S. at 26.

[2] *Id.*

[3] On April 17, 1973 the Department of Health, Education and Welfare sent letters to 184 elementary and high school districts in 16 States requiring them to show why they should not be held in violation of the 1964 Civil Rights Act, and giving notice of enforcement proceedings if compliance is not achieved. *New York Times*, April 18, 1973, Section L, Page 61.

culpability on the school district's behalf. As the court in *Deal v. Cincinnati Board of Education,* 419 F.2d 1387 (6th Cir. 1969) *Cert. Denied,* 91 S. Ct. 1630, stated:

> "In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young. Nor should such burden be saddled upon the owners of real property who are taxed in Ohio to provide funds for the operation of public schools. Appellants should invoke whatever remedy they have against the agencies which committed the alleged wrongs of which they complain. These agencies were not made parties to this case." 419 F.2d at 1932.

Where a residential neighborhood has been black since the beginning of its development and there were sufficient numbers of students living there to support an elementary school, the school district authorities should not be saddled with the burden of reversing socio-economic forces over which they had no control. The Court in *Deal, supra,* quoting from *Northcross v. Board of Education of City of Memphis, Tenn.,* 302 F.2d 818 (6th Cir. 1962) *cert. denied,* 370 U. S. 944, set forth the minimal requirements for non-racial schools:

> "'Minimal requirements for non-racial schools are geographic zoning according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right.'" 419 F.2d at 1392-93

In the record of the instant case there is no evidence that the above requirements were not fully met by Petitioner in the establishment and maintenance of Grant School.

SUMMARY

In order for a suburban school district to maintain its identity and to establish guidelines for the future construction and maintenance of schools within its jurisdiction, a definitive ruling from this Court is crucial.

Respectfully submitted,

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APPENDIX

PROCEEDINGS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Administrative Proceedings

In the

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

National Science Foundation

In the Matter of: School District of the City of Ferndale, Michigan (hereinafter called "School District") and State of Michigan Department of Education (hereinafter called "State Agency"), Respondents.	Docket No. CR-866

Initial Decision

THE PROCEEDING HEREIN

This proceeding is brought pursuant to Section 602 of the Civil Rights Act of 1964,[1] Regulations of the Department of Health, Education, and Welfare,[2] and Regulations of the National Science Foundation.[3] An order is sought terminating Federal financial assistance to the School District. It is charged that the School District established

[1] PL 88-352; 78 Stat. 240; 42 USC 2000 D-1.

[2] 245 CFR 80.

one of its schools, the U. S. Grant Elementary School, with the intent to provide a racially segregated education for elementary school age Negro children residing in the vicinity of the school, and that to the present time it has intentionally maintained the Grant School as an all-Negro school. It is charged that the boundaries for the attendance zone of the U. S. Grant School were established to conform substantially with the privately imposed racial segregation in residential housing. Further, it is charged that from 1926 to 1964, all full-time classroom teachers assigned only to the U. S. Grant School were Negro, and that the teaching staff of the school is predominantly Negro in the 1968-69 school year.

The School District denied that the site of the Grant School was selected with the intention to provide a racially segregated education for elementary school age children residing in the vicinity of the U.S. Grant School, and stated that the site was chosen with the intent to provide a convenient neighborhood elementary school for children residing in that area without regard to the race of the children. It denied that the attendance zone was established to conform with a racially segregated residential pattern, and it alleged that the attendance zone was established to conform to the political boundaries of the Royal Oak Township, as a convenient, manageable, and educationally sound attendance zone. The School District stated that white teachers served in the Grant School prior to 1964, and that a majority of teachers in the Grant School in 1968-69 are white.

The General Counsel alleged that the School District had been asked to desegregate the Grant School and that the School District had refused. The School District stated that it had taken no action to cause segregation to

exist in the Grant School, and that the operation of the Grant School was not in violation of the laws and the regulations of the United States or the State of Michigan.

A hearing was held on July 19, 1969 in Detroit, Michigan, and continued to July 25, 1969. It was resumed in Washington, D.C., on September 4, 1969 and on April 3, 1970. The Appearances: Roderick H. Potter, Esq.; Jerry H. Luck, Esq.; and Edward P. Levy, Esq.; Office of the General Counsel, HEW, Washington, D.C.; Burton R. Shifman, Esq., on behalf of the School District of the City of Ferndale, Michigan; Gerald F. Young, Esq., Attorney General's Office, State of Michigan.

Subsequent to the submission of all briefs, oral argument was held on September 17, 1970 in Washington, D.C.

The School District of the City of Ferndale
The Grant School; The "Grant Area"

The School District of the City of Ferndale covers not only most of the City of Ferndale, but also other adjacent areas under other municipal governments: The City of Pleasant Ridge, part of the City of Oak Park, and part of Royal Oak Township (east of Wyoming Avenue and south North End Avenue). The School District operates public elementary schools in each of these municipalities. The senior high school and the junior high school are in the City of Ferndale. The school in question here, the Grant School, is in Royal Oak Township.

Royal Oak Township was the original overall municipal unit, some thirty-six miles square, out of which the villages and cities were organized. The Township abuts directly on the City of Detroit (8-Mile Road). Only a fragment of the original Township area remains in the Town-

ship Government: a small area on 8-Mile Road and a small area at Greenfield and Ten Mile Road. That part of the Township on Eight Mile Road west of Wyoming is the "Grant neighborhood." (Royal Oak Township east of Wyoming Avenue is in the Carver district, not the Ferndale School District.)

The Grant area is a Negro residential neighborhood; the rest of the Ferndale School District is substantially a white residential area.[4] As a residential area, it is separated from other residential areas in the School District by non-residential property, i.e., there is no residential contiguity with the other parts of the Ferndale School District. The Grant School attendance zone was purportedly established to conform to the political boundaries of the Grant area.

The School District operates ten elementary schools, a junior high school, and a senior high school. (Findings of Fact No. 9, Schools and Enrollments.) There are now 4,412 elementary school students, of whom 396 are Negro. All but 31 of the Negro students attend the Grant School.

Opinion of the Hearing Examiner

The Examiner rejects the contentions of the School Board that the Grant School was innocently established and innocently maintained as a "neighborhood" school; that its student body is and was all black because the residential area in which the school was established was and is all black and the School District did not create this residential pattern. The weight of the evidence requires the

[4] There is a small district near Nine-and-a-half Mile Road and Goodrich Avenue which has some Negro residents.

findings (Findings of Fact below) that the School Board established the Grant School as a separate school for Negro children for the purpose of segregating the Negro children in the Grant area from the white children in its elementary schools; that it continued to maintain the school with an all-black student body for that purpose; and that it assigned a segregated teaching faculty to the school for many years in accordance with a purpose to discriminate against the black children in the Grant area; that the School Board's course of conduct for forty-four years has been consistently one of segregating the Negro children residing in the Grant area and the Township, from the Ferndale City elementary schools.

Further, it must be found that the course of conduct of the School Board was consistent with the pattern of private discrimination and adjuvant public action, that created and maintained racially separate black and white residential neighborhoods, and that the residential segregation and the school segregation each supported the other.

On the basis of the foregoing, the Hearing Examiner finds that the Grant School is and was a *de jure* segregated school. The school is maintained in violation of the Civil Rights Act of 1964, *supra*.[5]

However, while the evidence is sufficient to find that racially motivated actions of private persons and political entities other than the School District were the principal cause of the *residential* racial segregation herein, the Examiner will not find (as proposed by General Counsel) that such "de jure" residential segregation in and of itself creates a *de jure* segregation of the public schools where the student-assignment system is based on the segregated residential pattern.

---

[5] Section 601 of the Civil Rights Act of 1964 states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

I.

The Grant School Established as a Segregated Facility.

The course of conduct of the School Board should be viewed against the background of the three decades following World War I: The 1920's: Rapid economic expansion and suburban growth. The 1930's: The Great Depression, and a continuing depressed economy.

Stasis in growth of the suburbs; their financial difficulties. The 1940's: The war years, scarcities in the economy, post-war economic development and resumption of suburban growth.

Detroit and its immediate environs, Ferndale, the Township, and the other municipalities are a paradigm reflecting the general conditions in each decade.

At the beginning of the 1920's the School District had three elementary schools: Roosevelt, Harding, and the Ridgewood School (the last demolished during that decade). In 1923 the Wilson School, and the Washington School, are added. There are apparently no geographic attendance zones.

In 1924 two additional schools are authorized: Jefferson and Coolidge, each with 12 rooms, 460-480 capacity. They opened in 1925. Geographic zones are now established (September 1925). The Jefferson School attendance zone includes the Grant area. Enrollment in the Jefferson School during the 1925 school year was about 297; about 34% of the students (101) were Negro children.

A few weeks after the Jefferson School was opened, the School Board determined (October 1925) to build the Grant School, in the Grant area (within the existing Jefferson attendance area), about one-half mile from the Jef-

ferson School. The Grant School was designed to be one-third the classroom structure of the Jefferson School, i.e., the size of a four-classroom structure. This reflects the one-third ratio of Negro to white children in the Jefferson School.

The Grant School was opened in September 1926 with an all-Negro student body (except for one white child) and an all-Negro faculty. The latter, either in its entirety, or almost so, must have been hired for the opening of the Grant school. All the Negro children in the Jefferson School were transferred to the Grant School. Administratively, the new school was an annex of the Jefferson School; the Grant School had no principal of its own, the white principal of the Jefferson School acted as its principal.

The evidence indicates a purpose to segregate the Negro children in a separate school to be located in the Township, and to remove these children from the Jefferson School.

a) The presence of the Negro children (from the "Grant area") in the Jefferson School (in Ferndale) had been unwelcome and seriously disturbing. The Superintendent stated (Exhibit G-45), clearly referring to the mixing of the children, "Before the Grant School was built this district went through a period of turmoil because there were a large number of children in the Grant section in the Jefferson School."

b) There is other evidence of racial tensions in both communities, the white community (Ferndale) and the Negro community (the Township). The record indicates that members of the Negro community were disturbed by indications that there was an intention to segregate their children in the schools. It is fair to find that the inception

of the Grant School took place in an atmosphere of racial hostility.

In particular, a civil rights suit was brought in the Circuit Court for the County of Oakland (Exhibits G-28, 32) by certain members of the Negro community, at about the time the Grant School was being planned. It was alleged (among other allegations relating to the immediate issue of the lawsuit) that the School Board intended to clear the colored children out of the Jefferson School. This was denied by the School Board. Nevertheless, the Grant School was opened, as a Negro School, some eight months after the dismissal of the suit, and the Jefferson School did become a white school.

The answer of the School Board and Superintendent in this lawsuit is one of several things inviting skepticism of the claim that the Grant School was built for the convenience, safety, and welfare of the children of the Grant area, and the needs of the District (the "neighborhood school defense").

The answer refers to an annexed Resolution, passed September 18, 1925 establishing the attendance zones. It states that the attendance zones were drawn "after long, careful, mature, and deliberate study and consideration of the needs and the welfare of the children in the School District . . ." This means certainly that in September 1925 the needs and welfare of the Grant area children properly placed them in the Jefferson School. As of *December 19, 1925,* the date on which the answer is sworn to (which is after the Grant School was approved), there is no pretense of change in the School Board's position as to the propriety of the Jefferson School for the Grant area children. Note that the charge has been made that the children in the Grant area were to be segregated. But, as

of December 19, 1925, there is no suggestion that the children would have greater convenience and safety in a "neighborhood school" a half mile away, or that the District as a whole needed this addition in the Jefferson School attendance zone.

The affiants stand on the assertion that the Grant area children belong in the Jefferson School (i.e., after long, careful, mature, deliberate study, etc.). The rationale for the Grant School now offered in this proceeding apparently had no existence or motive force in September 1925 nor as late as December 1925. Under all the circumstances, it is questionable that convenience, safety, and needs of the District, etc., entered in the minds of the officials, in October or December 1925, with respect to their determination to transfer the Grant area children to a Grant area school.

c) The Grant School was certainly intended to be a Negro school. An all-Negro faculty was discreetly assembled for the new school. They were not hired for the Jefferson School (the attendance area in which the Grant School children had been placed in September 1925), or for the children generally, in the Jefferson area. The arrangements for an all-Negro faculty must have been completed and executed in advance of the opening of the Grant School. It must have been determined that the attendance zone of this new school would be based on race, or on a racially segregated neighborhood. Indeed, the record does not show that a geographic attendance zone was formally established for the Grant School at this time or for some years thereafter.

The answer of the Respondent in this present proceeding states that geographic attendance boundaries of the Grant School were established on the basis of the political

boundaries of the Township. The Township was then and is now a Negro neighborhood. If the design was to establish the Grant attendance boundaries on the Township political boundaries, then the "attendance zone" of the Grant School was planned to conform to the patterns of racial segregation in residential housing. Further, with respect to the design to use the Township lines as school boundary zones, the Township was separated from the white residential areas (below, Findings of Fact). The ultimate effect was that the Grant area children would be removed not only from the Jefferson School but from the Ferndale City area.

d) The singularities in the planning and construction of the Grant School are reasonably explicable only on the theory of a purpose to segregate the Negro children from the white children in the Jefferson School, and withdraw them as elementary school children from the white suburb. There was no apparent immediate need for additional school capacity in the Jefferson School geographic attendance zone, established one month before the Grant School was planned. If more capacity were needed for future population growth (the expertise and forehandness of the School Board is made much of by the Respondent) the reasonable, economic and prudent course would be the expansion of the Jefferson School rather than the building of this small, anachronistic four-classroom unit a half mile away. The new building was uneconomic from the point of view of construction costs it was also administratively impractical. It had no principal of its own, but was administered by a white principal at the Jefferson School. It could only become what it did become, administratively and geographically, the Negro annex of the Jefferson School.

If it were really designed as an independent school for a neighborhood, the expertise and forehandedness of the School Board were little in evidence. The Grant School very soon became overcrowded and remained overcrowded for a decade, while the Jefferson School remained underutilized.

The Grant School had all the earmarks of an *emergency measure,* to segregate, rather than an expansion of capacity, or a design for convenience and safety of the Negro children.

The foregoing is substantiated by the fact that the construction of Grant was given *priority* over construction of schools in other areas where there was actual serious overcrowding.

The Career of the Grant School Shows an Intent to Maintain the School as a Segregated All-Negro School

During the 1930's the student capacity of the Grant School remained the same. However, its enrollment steadily increased and it became markedly overcrowded. Some of the classes were reduced to half-day. In the same period the Jefferson School remained markedly under capacity. The Washington School and the Taft School, two other schools near the Grant School, were also under capacity.

No attempt was made to equalize the under-use or overuse of the four schools by shifting students or faculty. Such interchanges were the ordinary procedure of the district, but with respect to the Grant School, the only transfers were transfers of additional Negro students into the school. Instead, the School District sought financing to expand Grant, both from Federal emergency agencies and

from local sources. This could not be accomplished in the 1930's. The expansion of the Grant School was sought during severe depression (with money scarce and the taxpayers reluctant), while there was adequate capacity in the neighboring schools.

The attendance zone of the Grant School was rigidly racial; apparently no consideration could move it, either financial stringency in the School District, or simple justice to the children in the Grant area. The desire to keep the Negro elementary school children out of the other schools prevailed over a duty to provide full-time schooling. The "neighborhood" concept is stretched beyond absurdity.

The Superintendent recognized (G-45) that the Jefferson School could take additional children. But they could not be placed there as a "separate grade by themselves," since the Superintendent thought that this "would be a pure case of segregation" and illegal under Michigan law. To mix the grades in Jefferson would revive the "turmoil" of earlier days. As to transferring the children to the Taft School, the Superintendent cautions the Board as to the attitude in the Taft section. Such a transfer of the Negro children would not be prudent.

In the 1940's, the Grant School was enlarged, in 1942 and in 1945 (to 320 students and 360-480, respectively). The expansion in the 1940's was inadequate for the overcrowded conditions. After the first expansion, the Negro children in the 7th and 8th grades in the Taft School (Ferndale) were transferred to the Grant School, in part nullifying the effect of the expansion of the Grant School.

Apparently the money for this expansion of the Grant School was obtained from a Defense Public Works program. It would appear also that permission had to be obtained to use scarce materials. Again, it is to be noted

that the Jefferson, Taft, and Washington Schools were under-capacity at the time. The purpose and intent to maintain the segregation, disguised by the "neighborhood" concept, required emergency financing and emergency construction during war time.

At about this time it appears that the Superintendent contemplated a further enlargement for the Grant School so that it could be a "complete school through twelve grades with such facilities for work experience as to give these colored pupils the best opportunity for economic improvement" (G-46).

The faculty of the Grant School remained all-Negro during this period, and faculty segregation was the practice of the School District as a whole. It was not until 1949 that a black teacher was assigned to teach in a white school.

Intent and motive to segregate the children, considered generally:

Counsel for Respondent asks whether it is believable that public officials of the character of Superintendent Down, Mr. Norton, and other members of the School Board would intentionally segregate the Negro children from the white children, an act illegal under Michigan law. Counsel states that many of the facts are as consistent with the intent to operate a racially neutral school as they are with the intent to operate a racially discriminatory school. It is suggested that where the same facts are as consistent with the theory of an innocently established neighborhood school as with the theory that the school was established to segregate the Negro children, the proper inference, particularly in view of the character of the witnesses and the School Board is that the school was innocently established.

The Examiner has stated that the facts and sequence of events are not consistent with the defense that the school was innocently established and maintained as a "neighborhood" school.

As to the inference that the School officials would not violate the law:

Segregation of school children can be openly and frankly declared, and it can be accomplished covertly. The latter may be pursued in the sincere belief that it is socially necessary in a School District that has racially separated and racially hostile neighborhoods. It may be believed that such separation raises the educational quality of the resulting white schools. Covert segregation or separation of races is indeed the accepted morality of the times; far from an odium or taint of illegality attaching to it, it is considered commendable, particularly by the dominant white suburbs.

The District School officials will not practice "pure" segregation (Superintendent Down's word—Exhibit G-25); i.e., they will not declare that the white children were to be educated separately from Negro children, nor would they segregate Negro children in a separate class in a white school (G-45). But it is plain enough that the School Board and the Superintendent accepted the then respectable doctrine of "separate but equal", as a solution to racial turmoil. The practice and ethic of the times is "separate but equal"; racially restrictive covenants; private discrimination in housing; separate racial neighborhoods; "prudence" in the administration of a School District; the avoidance of "turmoil"; Negro teachers for Negro children, white teachers for white children; the maintenance of the nicer standards of the white neighborhoods. (G-45

—"One has only to go over there to realize the standard of homes these children come from. Therefore they seem to have no great incentive to have a nice school. There seems to be a tendency to bring everything to their level.") The "separate but equal" doctrine is clear in Superintendent Down's memo; "I might add that the amount that is paid in taxes by that group is very small. This, however, could not be a consideration for not giving equal advantages."

A sense of wrongdoing may not be found, but the evidence is sufficient to find a conscious intent to separate the children because of their race. The establishment and maintenance by public officials of a separate school on the basis of race is *de jure* segregation when it is practiced anywhere in the United States.

The neighborhood school concept—the convenience and safety of the children—when applied to the singular circumstances under which the Grant School was established—presents a certain irony. The School Board certainly knew that the black community believed its children were going to be segregated in a school. The black community is smarting with the idea of a racial school in a Northern State. (Indeed, this case is unique in that some 45 years ago the protest is stated in a civil rights lawsuit.) The "convenience" that is bestowed on the neighborhood may not be well received, when

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[6]

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[6] *Brown v. Board of Education, Topeka*, 347 US 483 (1954).

It is now further suggested that if this neighborhood school had not been built, the School Board could have been "guilty of failure to give equal protection of the laws to the residents of the southwestern portion of the School District", i.e., since the white neighborhoods have this "convenience."

The irony of "convenience", the "neighborhood school," "equal protection of the laws" increases in the light of the later history of the School, when the alleged "neighborhood" is rigorously maintained, despite "financial stringency." In depression, in wartime, and a situation where the Grant School is so overcrowded that some of the children are in part-time classes, and there is capacity for them in adjacent schools.

Intent to Segregate: The attendance zone of the Grant School

—as conforming to the pattern of racial segregation in residential housing.

—as conforming to the political boundaries of Royal Oak Township.

—established consistent with an overall pattern of conduct of other political bodies, that separated the Negro neighborhood, and the Township, from the other communities in the School District.

The answer of the School Board in this proceeding contains the statement that the attendance zone of the Grant School was established to conform to the political boundaries of Royal Oak Township, as a convenient, manageable, and educationally sound attendance zone.

The political boundaries of Royal Oak Township have a considerable significance in the context of this case. This

municipal area embodied the major Negro neighborhood in the School District. The racial characteristic of the Township was no accident: Racial covenants were not present in the Township; they existed in the adjacent neighborhoods of Ferndale and Oak Park. The pattern of racial segregation in residential housing conformed substantially to the pattern of racial covenants.

The racial nature of the neighborhoods, and of the Township, and the almost certain course of their development as residential neighborhoods, were known to the School Board.

Furthermore: the borders of the Township on Ferndale and Oak Park, were so managed and controlled by other political bodies, particularly with respect to land utilization, to insulate the Negro residential area from the white residential areas. (Findings of Fact, below.) At the least, the *fact* of non-contiguous residential areas between the Township and the white suburbs during the decades in question was plain and known to the School Board.

What emerges is school segregation in the Jefferson-Grant area as part of and consistent with the separation of the neighborhoods, racially, politically, physically. All factors in the separation are intertwined, and the many acts that produced the separation are not discrete. The Negro children of the Grant area, as elementary school students, are confined to a Negro neighborhood, a political entity, and a physically separate neighborhood; a body of Negro teachers is recruited for a particular school in a particular neighborhood. The consistent conduct of the School Board (refer particularly to the later incidents of the rigorous maintenance of the racial line by the School Board and the refusal by the Board to relieve serious overcrowding in Grant, and part-time classes, by trans-

fer of children to the white schools) parallels the series of acts in the continuing effort towards political, physical, and racial separation.

There is no need to show a concert of action with other municipal bodies, or with the private discrimination and adjuvant legal support. The whole pattern is one of segregation, including the segregation of the Negro children of the Grant area, as elementary school children, from the Ferndale city residential area. The attendance zone of this school does not innocently coincide with the political boundaries of Royal Oak Township.

It was stated above that the pattern of racial segregation in residential housing conforms substantially to the pattern of previously enforceable racial covenants. It is argued by counsel for the rspondent, that at the time the Grant School was built, the effect of racial covenants had not been established. It is stated that the case of *Sanborn* v. *McLean*, 233 Mich. 227, 206 N.W. 496, was not decided until December 22, 1925, more than two months after the decision to build the Grant School, and prior to that decision there had never been any recognition in Michigan law of the doctrine of negative reciprocal easements. However, the land in the Grant area was not restricted by privately imposed racial covenants; the adjacent land had racial restrictions in general plans for development, to exclude Negroes. Racial restrictions had for many years been upheld in Michigan (prior to the plan to build the Grant School). It is sufficient to show that racially restrictive covenants existed and were enforced, to infer that residential segregation resulted from discrimination. (*Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (U.S. Dist. Ct. C.D.Cal.) 1970). "The existence of residential segregation based upon discrimination may be inferred from evidence of the existence and enforcement by

courts in the past of racially restrictive covenants. It may be inferred from testimony that there are significant areas of a community in which black persons do not and have not resided. It may be inferred from testimony that realtors have not sold, or have been reluctant to sell, houses in certain areas of the community to Negroes. *Dowell* v. *Board of Education of Oklahoma City*, 244 F.2d 971, 980 (W.D. Okla. 1965), *affirmed*, 375 F.2d 158 (C.A. 10, 1967)."

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Discrimiantory intent of the School Board in establishing and maintaining a Negro school or schools, is *de jure* segregation:

> *U. S.* v. *School District 151, Cook County, Ill.*, 286 F. Supp. 786 (N.D. Ill, 1968), aff'd, 484 F.2d 1125 (7th Circ. 1968), 301 F. Supp. 201 (N.D. Ill, 1969).
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> *Taylor* v. *Board of Education of City School District of City of New Rochelle*, 191 F. Supp. 181 (S.D. N.Y., 1961); 195 F. Supp. 231 (S.D. N.Y., 1961); 294 F. 2d 36 (2nd Cir. 1961); *cert. denied*, 368 U.S. 940 (1961).
>
> *Davis* v. *School District of the City of Pontiac*, 309 F. Supp. 734; U.S. Dist. Ct. (E.D. Mich. S.D. (1970)).
>
> *Spangler* v. *Pasadena City Board of Education, supra.*

There are variations in the conduct of the School Board in each case, and factual differences from the instant case. However, the intent, and the consequence, and the principle involved, are the same.

The Respondent relies principally on

> *Bell* v. *City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind. 1963) aff'd, 324 F. 2d 209 (7th Cir. 1963) *cert. denied*, 377 U.S. 924 (1964).

This case does not present the factual situation of the instant case. The finding of the court in Bell is that the School District had no duty to eliminate the segregation since it had not intended to create the segregated schools. The Hearing Examiner finds herein that the School Board intended to create a segregated school. *Bell* involved non-racially motivated *de facto* segregation in a school system. The court held that the school board did not deliberately segregate the races.

II.

General Counsel requests a finding that the School Board has violated the rights of black elementary students under the Fourteenth Amendment to the Constitution by building a student assignment system upon a segregated residential pattern that was created by the racially motivated actions of private persons and State entities other than the District. It would follow, in effect, that a School Board has an affirmative duty to desegregate a Negro school and achieve some racial balance in the schools if the black and white residential areas in which the children respectively live result from private action and adjuvant State action, even though the School Board has taken no step to cause the residential segregation, and even if the black school were innocently established.

The findings herein are that the Grant School was not innocently established, and not innocently maintained as a Negro school, and that the School Board segregated the Negro children, and that it established the school to conform to a pattern of racial segregation in residential housing, for the purpose of segregating the children.

Beyond this it is not necessary to go, and the Examiner does not propose to make a finding of the broad scope re-

quested by General Counsel. This proposition has not been established by judicial decision in a case in which the finding of *de jure* segregation in a school is based on the finding of *de jure* neighborhood segregation.[7]

The Examiner agrees that the proposition may logically follow from *Brown I*;[8] that is to say, if children are segregated in a neighborhood (as a result of some public action) and if they must go to a neighborhood school; in effect, then, law or official act has placed them in a segregated school. As in *Brown I*, the children can be said to be denied equal opportunity in education, by State action.

It may be that the finding proposed should be a principle of law that "should be applied nationally." The court stated in the recent case, *Swann* v. *Charlotte-Mecklenburg Board of Education*, No. 14,517 (4th Cir., May 26, 1970): "The necessity of dealing with segregation that exists because governmental policies foster segregated neighborhood schools is not confined to the Charlotte-Mecklenburg School District. *Similar segregation occurs in many other cities throughout the nation, and constitutional principles dealing with it should be applied nationally. The solution is not free from difficulty.*" [Italics supplied]

The Court stated that it is now well settled that school boards *operating dual systems* have an affirmative duty to convert to a unitary school system in which racial discrimination would be eliminated root and branch (citing *Green* v. *School Board of New Kent County*, 391 U. S.

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[7] Refer, in this connection, to *Deal* v. *Cincinnati Board of Education*, 419 F. 2d 1387 (6th Cir. 1969);

Deal v. *Cincinnati Board of Education*, 369 F. 2d 55 (6th Cir. 1966), *cert.* denied 389 U.S. 847.

[8] *Brown* v. *Board of Education of Topeka, supra.*

430, 437, 1968). That is to say, if a dual school system, or a segregated school or schools have been established by law or official act, a neighborhood concept will not be permitted to prevent desegration. This is probably true of neighborhoods established *de facto,* as well as *de jure.*

In *Spangler* v. *Pasadena City Board of Education, supra,* the Court stated: "School boards may not build upon residential segregation, when that segregation is the result of either private or state enforced discrimination. *Brewer* v. *School Board of City of Norfolk,* 397 F.2d 37, 41-42 (C.A. 4, 1968). Defendants have a duty to attempt to overcome the effects of residential segregation on student assignments. 'Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in the neighborhood is denied to Negro pupils solely on the grounds of color.' *Id* at 42; *United States* v. *School District 151,* 286 F. 2d at 798. See also, *Green* v. *County School Board,* 391 U. S. at 442."

But the determination in the *Spangler* case was that the Board had by affirmative action established the segregated schools, and the issue was the desegregation of the schools. As in the *Swan* case, in the desegregation of a dual school system, the neighborhood school concept will not be permitted to prevent the actual desegregation.

There is another reason for not making the finding requested. The distinction between *de facto* and *de jure* residential segregation and their effect, as operative factors in the establishment of segregated schools, leads into a morass. A national problem (the exact nature of which is itself not entirely clear) should not be dealt with on the basis of legalisms, which may be regional, and, when closely examined, may be evanescent. The General Counsel has gone to some lengths to show that residential seg-

regation has been caused, among other things, by Federal Housing Administration mortgage policies. Was the Federal Housing Administration a governmental function in the classic sense? Or part of the interpretation of Government economic and fiscal policies in the private economy? The Welfare State and a Government-supported political economy have been functioning for nearly forty years. It would be hard to state which aspects of our social and economic and private relationships generally have not been profoundly influenced or determined by political-economic action.

The Courts, perforce, have become the primary legislative and administrative bodies in dealing with the structure of schools today. The Examiner will leave the problem of the making of new law, on residential segregation, and consequent *de facto* or *de jure* school segregation, to the Courts. "The solution is not free from difficulty." (*Swann, supra.*)

Findings of Fact

1. Respondent School District is a corporate public body organized and existing under the laws of the State of Michigan. It is vested with the control and management of the public schools of the area within its jurisdiction.

2. Respondent State Agency exercises general supervision over the public schools of the State, including those under the immediate administration and supervision of Respondent School District and is the state educational agency which manages the expenditure and administration of funds and property granted within the State by the United States for educational purposes under various Acts of Congress administered by the Department, and its duties in this connection extend to and include the distribution of a portion of such funds and property to Respondent School District.

3. Respondent School District either receives, has applied for, or could apply for and receive, Federal financial assistance under one or more Acts of Congress administered by the Department of Health, Education and Welfare and the National Science Foundation.

4. Respondent School District is eligible to participate in or benefit from each and every class of assistance referred to in Finding 3, subject only to the approval of the Respondent State Agency, provided that it is in compliance with the Civil Rights Regulations of the Department of Health, Education, and Welfare and the National Science Foundation.

5. Respondent School District filed with the Department an HEW Form 441, Assurance of Compliance with the Department of Health, Education, and Welfare Regulation under Title VI of the Civil Rights Act of 1964, which gave assurance that Respondent School District will immediately take any measure necessary to effectuate compliance with Title VI and the agreement.

6. The School District of the City of Ferndale encompasses about 4.5 square miles of territory in Oakland County, Michigan. It includes most of the City of Ferndale, all of the City of Pleasant Ridge, part of the City of Oak Park, and that part of Royal Oak Township east of Wyoming Avenue and south of Northend Avenue. The population of the School District is 38-39000. The houses are generally middle-class, single dwellings.

7. Ferndale was incorporated as a village in 1917, Pleasant Ridge in 1919, and Oak Park in 1927. Population expanded very rapidly from about 1917 to about 1929-30. In 1920 Ferndale's population was 2,640, and in 1930 it was 20,855. The "Grant area" also gained population during this period, although the rate of growth was not as pro-

nounced as in Ferndale. This area is still part of the unincorporated area of Royal Oak Township. That section of the District in Oak Park, although officially subdivided during the 1920's or before, was not densely settled until later years. Population of that entire municipality was only 1,100 in 1930, and schools were not built in the Oak Park section of the District until the early 1950's.

Many of the new citizens of the area in the early 1920's were apparently of modest means; settlers often lived in tents, garages, or temporary structures until their homes were completed. This practice was apparently prevalent in both Ferndale and the Grant area.

8. Black persons moving into the District settled either in a small area near Nine and a Half Mile Road (Woodward Heights) and Goodrich Avenue, or in the Grant area. A few residents, probably white, had been in the Grant area since about 1912. There was no immediate growth of a black population in the Grant area after the first subdivision was platted in 1916; the first black residents arrived about 1920. Beginning about 1924, blacks began moving into the Forest Grove subdivisions in the Grant area. The rate of growth of the Grant area was slow and steady from 1925 to 1930, very slow from 1930 to 1939, and very fast during the decade of the forties.

9. The following table lists the schools in use by the School District, their grade structure and 1968 enrollment.

Name of School	*Grades*	*1968 Enrollment*
Ferndale High School	9-12	2528
Lincoln Junior High	7-8	1258
Best Elementary	K-6	416
Coolidge Elementary	K-6	522
Grant Elementary	K-6	365
Harding Elementary	K-6	313
Jackson Elementary	K-6	394
Jefferson Elementary	K-6	394
Roosevelt Elementary	K-6	699
Taft Elementary	K-6	446
Washington Elementary	K-6	309
Wilson Elementary	K-6	454

10. 817 of the 8098 students in attendance in September 1968 were members of minority groups. All but 78 of the minority group were black students. All high school students (Grades 9-12) attend Ferndale High and all junior high school students attend Lincoln Junior High (Grades 7-8). Student assignment to the elementary schools is determined by geographic zoning with one school serving each zone. Of the 4312 elementary students, 396 are black and 50 are members of other minority groups. Four of the elementary schools have one black student each; Taft has three black students; Harding has about twenty-five black students, eight per cent of its enrollment. The Grant School has an all-black student body.

11. 92% of the black elementary students in the School District attend the all-black Grant School.

12. In September 1968, the Respondent employed approximately 332 full-time teachers, of which 30 were black. The Grant School was the only school where a majority of the full-time faculty members were black—eleven of nine-

teen. The only black principal in the system was assigned to the Grant School; an assistant principal at the Lincoln Junior High School is black.

13. The rapid growth of the District's population during the decade from 1920-1930 necessitated the construction of numerous new facilities. The following new elementary classrooms were built during the decade:

Year	*School*	*Type of Construction*
1920	Harding School	New
	Roosevelt School	New
1923	Washington School	New
	Wilson School	New
1925	Coolidge School	New
	Jefferson School	New
1926	Grant School	New
	Roosevelt School	Addition
	Wilson School	Addition
1928	Taft School	New
1930	Harding School	Addition
	Coolidge School	Addition

14. On September 18, 1925, the Board of Education adopted a resolution establishing attendance boundaries for the elementary schools. It may be inferred from the Board's action in delineating boundaries in 1925 that, prior to that action, the choice of schools was still a matter of parental discretion, at least in part.

15. In September 1925, the new Jefferson School was opened and most of the students from the Grant area attended. As a result of the Board's subsequent adoption of the geographic zoning system, all the students from the Grant area were assigned to the Jefferson school.

16. At or about the time the decision to build the Grant School was made by the School Board, suit was brought by four black students by their next best friend, Anna Eaton Thomas, against Edgar F. Down, Superintendent, and the School Board, in which suit, among other things, it was alleged that the Superintendent and the School Board were planning and conspiring to establish and build separate schools for Negro children in the Ninth School District (Ferndale School District). This was denied by the Superintendent and the School Board (among other denials). The School Board stated that the geographic zoning under which the Grant School children were placed in the Jefferson School attendance zone was drawn after "long, careful, mature, and deliberate study and consideration of the welfare of the children of the School District". The suit was dismissed by the Circuit Court.

17. Of the 297 students enrolled at Jefferson School during the 1925 school year, about 100, or about 34%, of those enrolled were Negroes.

18. The citizens' petition for the construction of a new school in the Grant area could have been received from citizens outside of the Grant School area. There is no evidence that it was submitted by anyone from the Grant area. The decision to recommend the construction of a new school was the Board's and not dependent upon the receipt of a citizen petition.

19. The Grant School was one of the three construction projects approved in the same election for elementary schools. The need for new facilities was acute in some sections of the District, but not in the Jefferson area when the decision was made to build Grant School. The Grant School received priority in the Board's order of construction of the 1926 additions.

20. When the Grant School was built there was adequate capacity for all the elementary students in the Southwest Quarter of Section 335 (the Grant School area approximately), within a reasonable walking distance.

21. There was no educational necessity for the construction of the Grant School in 1926.

22. The Grant School when it was built was the size of an ordinary four (4) room building, but the space had been divided into six rooms.

23. The increase in the number of rooms may have increased the usefulness of the building for a particular system of education, but the space requirement per child, and therefore the capacity of the school, remained approximately the same.

24. The District's schools were generally organized with self-contained classrooms. The original Grant School was designed pursuant to the "Unit Theory" of education. The theory provided that class size (and therefore room size) should vary with the type of activity or subject matter being taught or supervised.

25. The preponderance of evidence indicates that the Board was aware that the building of the Grant School would segregate the Negro children from the white children, and that this was their primary purpose. The black community knew that the building of the Grant School would segregate the Negro children, and objected to it.

26. Anti-Negro sentiment was openly expressed in the District during the period of time when the Grant School was authorized and built.

27. The Ku Klux Klan was active in the School District at the time the decision was made to build the Grant

School. Its activities were directed in part to intimidate black residents.

28. Many of the residents in the area to the north of the Grant School area in and around the Leggett Farm Subdivision were hostile to blacks.

29. In about 1923, or 1924, Mrs. Anna Thomas, a black resident of the School District, was approached by the principal of the Ridgewood School, Mrs. Agnes Terry, and encouraged to circulate a petition and present it to the School Board that would have requested the construction of a separate school for the black children in the Grant area.

30. When the Grant School opened in September 1926 all the black elementary children who had attended Jefferson School the previous year were assigned to the Grant School. All the students at Grant when it opened were black with the exception of one white boy.

31. The attendance boundaries of the Grant School were not clearly defined by the Board when the school opened in 1926.

32. The basis for assignment to the Grant School was primarily race and the residential area of the black children.

33. The School District designed the Grant School just large enough to fit the neighborhood that it contemplated for purposes of school attendance, and the black student body immediately expected.

34. The Board was aware of the racial boundaries in the development of residential subdivisions in the District.

35. The U.S. Grant Elementary School was intentionally established as a segregated school for black students.

36. The Board's action in establishing the Grant School at the time and place it did was inconsistent with its stated policy for school location.

37. When the Grant School was authorized in 1925, greater need for new facilities existed elsewhere in the School District.

38. The U.S. Grant School was built about one-half mile away from the Jefferson School at a time when sufficient capacity existed for the Grant area students in the Jefferson School.

39. For the purpose of comparing the intensity of utilization of the elementary schools, seating capacities of 30 and 40 students per room was a reasonable assumption for the Ferndale schools.

40. Grant had a capacity of 160 from 1926 to 1941; 320 from 1942 to 1945; and 320-480 through 1949, based on the assumed values of 30 and 40 students per room, respectively. In the years 1950, 1952, or 1953, other additions were made but the evidence is contradictory as to size and sequence. By 1953, at least eight more rooms had been built, making a total of 20 rooms with a capacity of 600 to 800 at 30 to 40 per room, respectively.

41. Jefferson had a capacity of 460 to 480 from 1925 to 1949, and from 580 to 640 through 1955.

42. Taft School had a capacity of 800 students from 1928 through 1955.

43. Harding had a seating capacity of 240 from 1922 to 1929. Assuming capacities of 30 and 40 students per classroom for the four-room addition in 1930, the capacity from 1930-1955 was 360 and 400.

44. Roosevelt had a seating capacity of 340 from 1922 through 1925. In 1926 it was increased to 650-700. In 1950 it was increased to 740-820.

45. Coolidge School had a seating capacity of 460 or 480 from 1925 to 1929, and 850 to 1,000 from 1930 through 1955.

46. Washington had a seating capacity of 460 to 480 from 1924 to 1953, and from 490 to 520 through 1955.

47. Wilson had an original capacity of 160 in 1923 that was increased to 500 in 1926, and remained constant through 1955.

48. Ridgewood had a capacity of 160 from 1925 through the first semester of the 1927-28 school year. The school was demolished in 1928.

49. Jackson had a capacity of 360 or 480 in 1950-1951, 480 or 640 in 1952, and 540 or 720 from 1953 through 1955.

50. Best had a capacity of 510 or 680 from 1954 through 1955 based on the assumed values of 30 and 40 per room, respectively.

51. The Grant School became overcrowded during the 1930's, beginning about 1932 and reaching a peak in 1938. Three of the six classes (not including kindergarten) were put on half-session days. Space was always available to alleviate the overcrowding during the 1930's and early 1940's at the Jefferson, Washington, and Taft Schools.

52. The overcrowded situation in the Grant School could have been alleviated by transferring children from the Grant School to the Jefferson School.

53. A common remedy for an imbalance of facility utilization in adjacent schools is an annual alteration of attendance areas.

54. The District tried unsuccessfully from 1936 to 1942 to get funding to enlarge Grant School, and during the entire period space was available to relieve the overcrowded school, in the contiguous school zones which were under-utilized.

55. In 1941 students in the overcrowded Grant School were not transferred to the Jefferson or Taft Schools, or attendance zones altered to relieve the overcrowding at Grant, because of the racial attitudes of the residents of the Taft School area, and the Jefferson School area.

56. In 1944 the Superintendent contemplated the enlargement of the Grant School so that students in the seventh to twelfth grades residing in the Grant area might be removed from the junior and senior high school in the Ferndale area.

57. In June 1945, the District obtained approval of a grant from the Federal Works Agency for the construction of an addition to the Grant School. Sufficient capacity was then available at Jefferson and Taft to house the excess of students over the capacity of the Grant School.

58. In 1963, the Board changed the attendance boundary between the Taft and Washington Schools to assign some students to Taft because of crowded conditions at the Washington School. The District's policy with respect to maintenance of the neighborhood attendance boundaries has not been completely inflexible.

59. White students have never been transferred into the Grant School.

60. Black students attended Taft Elementary School from 1930 to 1942, when the Grant School was made into eight (8) grade facility. That transfers further increased the concentration of black students at Grant School.

61. The full-time faculty of the Grant School was all-black when the school opened in 1926. No black teachers were then assigned to any other schools in the District. No full-time principal was assigned to the Grant School. The principal of the Jefferson School was the part-time principal of the Grant School—the only such arrangement in the District.

62. After the Grant School opened, it was publicly declared by Superintendent Down to be an all-black ("colored") School.

63. The practice of hiring only black persons for full-time positions at Grant was consistently maintained until 1952, when a white librarian was assigned there. It was not until 1964 that the first white full-time classroom teacher was assigned to the Grant School.

64. No black teachers were assigned to teach at any schools other than Grant until 1949.

65. The maintenance of all-white faculties at every school except Grant and a black faculty at Grant was not fortuitous, but the Board's response to a community attitude hostile to black teachers for white children.

66. The District had racially discriminatory procedures for the hiring of faculty during the superintendency of Mr. Robinson (1947-1961).

67. The practice of having one principal act in that capacity for both Jefferson and Grant Schools was continued until 1942 when Mr. Coit Ford became principal at Grant School.

68. The preponderance of the evidence indicates that the neighborhood served by the Grant School was known as a residential area primarily for blacks at the time the

school was authorized in 1925, and that the Board knew that the Grant area was being developed for the black residents at that time.

69. The white residents of the Grant area moved out after the Grant School was opened.

70. Racially restrictive covenants on land were enforceable in Michigan courts and were actually enforced in Oakland County. Racial covenants continued to be enforceable by the Michigan courts until 1948.

71. Racial covenants were widely used in the School District, particularly in the newly developing subdivisions, to exclude black residents.

72. On the borders of the Grant area or in the immediate vicinity, several of the subdivisions were racially restricted as a matter of record, according to a general plan. In other subdivisions, although the land records reveal no filing of a general plan, the deeds for the first sale of land from the subdivisions contain racial restrictions.

73. The effect of a developer's not having racial covenants on land was to deter the sale of land to white buyers in the 1920's and 1930's.

74. The pattern of residential segregation conforms substantially to the pattern of previously enforceable racial covenants on subdivided land in section 33, Royal Oak Township.

75. It may be inferred from a preponderance of the evidence that racial covenants on some of the land in the District contributed substantially to the extant residential segregation.

76. The pattern of segregated residential housing, developed before 1930, still exists in the District with the

exception of about five (5) black families that now live in formerly all-white areas.

77. The evidence of extant residential segregation, overlap in prices for housing in the black and white residential areas, the inability of a black realtor to solicit clients in the white residential areas, and the threatening expressions of anti-Negro sentiment to a black realtor attempting to do business in a white residential area indicates that private discrimination in residential housing exists to a substantial extent in the District.

78. The Federal Housing Administration (FHA) was active in the general housing market in the District.

79. Pursuant to explicit policy it discouraged the development of racially integrated neighborhoods. (*The Underwriting Manual,* Federal Housing Administration (FHA Form 2049, Revised Feb. 1538, sections 935, 937, 951, 952(1), 973, 980(3)).

80. The policy of the FHA encouraged the creation of artificial barriers to separate black and white residential areas.

81. The FHA *Manual* was in use at least until 1945, and for a few years thereafter.

(82) In general the *Manual* reflected the policy opinion of the FHA that racially homogenous neighborhoods were better insurance risks that racially mixed neighborhoods.

83. The existence of a school serving an area in which large numbers of children of different races lived was a negative factor in the rating of property by the FHA (*Manual,* Section 951).

84. Prior to the incorporation of numerous independent municipalities within its boundaries, Royal Oak Town-

ship included an area of 36 square miles. Royal Oak Township now consists of two non-contiguous areas—one on West Eight Mile Road and one at Greenfield and Ten Mile Road.

85. Ferndale was incorporated as a home rule city in 1927. In that same year it annexed from the Township a residential area north of the Grant School area and east of the present boundary between Oak Park and Ferndale. This tract contained the Leggett Farm and Northfield Subdivisions and part of the Detroyal Park Subdivision.

86. In 1940, Ferndale annexed about 50 acres immediately east of the Grant School area along its western boundary with the Township. The area annexed had never been subdivided for residential use; on the southern end was a small building owned by the Ethyl Corporation.

87. The present boundary between the West Eight Mile Road section of Royal Oak Township and Oak Park was formed in 1927 when Oak Park became a village. No attempt has ever been made by either Oak Park or Ferndale to annex any territory occupied by black residents.

88. The property on the Ferndale border of the Township is used for a city storage yard, the Ferndale High School, and light industry. The section used for light industry consists of the southern part of the property which was annexed to the City of Ferndale in 1940. It was zoned for business subsequent to annexation. The Ferndale High School is located on the northerly portion of this property and on the now vacated Northfield Subdivision. The area now used as a storage yard by Ferndale is located north of Northland Avenue, along the boundary between Ferndale and Royal Oak Township. This land lay vacant during the 1930's and 1940's with the possible exception of one house on the property. During the period from 1945

to 1950, the City of Ferndale acquired this property as the final result of the taking of the land by the State of Michigan for the non-payment of taxes. Initially, the northeastern part of it was used by the city as a nursery for the planting of trees which the city sold to residents. In the early 1950's Ferndale began using the land for storage purposes. The city put up a fence around the yard shortly after 1955 and, following commencement of its use for storage, planted poplar trees along its northern edge.

89. On the north the yard borders directly on residential properties in the City of Ferndale. It is also bounded by Central Avenue on the east, Northend Avenue on the south, and Republic Avenue on the west. Central Avenue is wholly within the city limits of Ferndale, until it reaches Northend Avenue; Northend is half in Ferndale and half in Royal Oak Township; and Republic is the Ferndale-Oak Park boundary for a short distance adjacent to the yard and, in a southerly direction toward the Township, is the Ferndale-Township boundary. None of these sections of road is paved, except the portion of Republic which divides Ferndale and Oak Park.

90. All of the land in Oak Park bordering on the Township was originally zoned for industry and it continues to be used for this purpose, except for some parcels which are apparently vacant. The land east of Wyoming and north of the Oak Park-Township boundary, which began to develop in the late 1940's is devoted to industrial use in accordance with the original zoning plan, although the industrial area has expanded slightly to the north. Oak Park's industrial area west of Wyoming has expanded further north and further west of the parcels originally zoned for industrial use in 1948.

91. That part of Royal Oak Township bordering on Ferndale is used exclusively for residential purposes. The

Township area east of Wyoming on the south side of Northend Avenue was essentially residential prior to 1955. Two places of business along that street existed after the property to the north in Oak Park had already developed industrially. To the west of Wyoming Avenue, property in the Township bordering on Oak Park was occupied by temporary World War II housing, much of which had not been removed as late as 1958.

92. It is reasonable to assume that land adjacent to the black neighborhood was not developed for residential purposes because such land was not readily marketable for white residential development.

93. It may be inferred from the consistent pattern of development of the territory of Ferndale and Oak Park bordering the Township that the municipalities were motivated, at least in part, in their control of land use by a desire to reinforce the existing racial segregation in residential housing.

94. It must be inferred from the language of the September 9, 1940, resolution of the City Commission, Ferndale, that the City Commission, in lending its support to the annexation of the 50 acres of vacant land lying between a white residential area and a black residential area, was motivated by a desire to control the development of the area by land use ordinances so as to maintain the residential segregation by race preferred by the FHA.

95. In establishing the attendance area served by the Grant School to conform to the pattern of racial segregation in residential housing, and to the political boundaries of Royal Oak Township, and in assigning an all-black faculty to the Grant School and an all-white faculty to the other schools, the School Board pursued a course of conduct consistent with the conduct of other political bodies

that separated the Negro neighborhood and the Township from white communities in the School District.

96. Respondent School District has not complied with its assurance filed with the Department as found in finding No. 5.

97. The Department properly determined that compliance with the Civil Rights Act of 1964, as implemented by the Regulation, could not be secured by voluntary means.

98. The School District has refused to desegregate the U. S. Grant School.

99. Assistance is available for elementary and secondary school purposes under the following authorizations:

Assistance Direct from HEW to School Districts Includes

		45 CFR
School Construction in Federally Affected Areas	20 U.S.C. 631-645	Part 114
School Assistance in Federally Affected Areas	20 U.S.C. 236-240	Part 115
Bilingual Education (Title VII, ESEA)	20 U.S.C. 880b, 880b-6	
School Construction and Operation in Case of Certain Disasters	20 U.S.C. 241-1, 646	Part 112, 113
Teacher Corps	20 U.S.C. 1101-1107a	
Surplus Real Property	40 U.S.C. 484(j)	Part 12
Drop-Out Prevention	20 U.S.C. 887	

Assistance from HEW Districts Distributed through State Agencies to School Districts Includes		
Education of Children of Low-Income Families (Title I, ESEA)	20 U.S.C. 241a-244	Part 116
Children of Migratory Workers	20 U.S.C. 241(a)(6), 241e(c)	116.3(f), .16(b), .17(k), .24(b)
School Library Resources, Textbooks, etc. (Title II, ESEA)	20 U.S.C. 821-827	Part 117
Supplementary Education Centers and Services (Title III, ESEA)	20 U.S.C. 841-848	Part 118
Education of Handicapped Children (Title VI, ESEA)	20 U.S.C. 871-877	Part 121
Strengthening Instruction in Critical Subjects (Title III, NDEA)	20 U.S.C. 441-444	Part 141
Strengthening Instruction in Humanities and Arts	20 U.S.C. 951, 952 and 961	Part 141
Guidance Counseling and Testing (Title V, NDEA)	20 U.S.C. 481, 485	Part 143
Vocational Education Acts	20 U.S.C. 1241-81(a), 1301-05, 1322, 1341-75	
Surplus Personal Property	40 U.S.C. 484(j)	Part 13
Assistance from National Science Foundation		
Cooperative College-School Science Program	20 U.S.C. 1861 *et seq.*	

100. Respondent School District is receiving Federal financial assistance for its elementary and secondary school system under the following statutes administered by the Department of Health, Education, and Welfare:

a. Education of Children of Low- Income Families (Title I, ESEA)	20 U.S.C. 241a-244
b. School Library Resources, Textbooks, etc. (Title II, ESEA)	20 U.S.C. 821-827
c. Education of Handicapped Children (Title VI, ESEA)	20 U.S.C. 871-877
d. Strengthening Instruction in Critical Subjects (Title III, NDEA)	20 U.S.C. 441-444
e. Vocational Education Acts	20 U.S.C. 1241-81(a), 1301-05, 1322, 1341-75)

101. Assistance received under 100a is used to provide compensatory educational services primarily by increased faculty staffing, at the U.S. Grant School, Lincoln Junior High School, and Ferndale High School.

102. Assistance received under 100b is used to purchase library books for each school in the system.

103. Assistance received under 100c is used to provide inservice training for teachers of emotionally disturbed children.

104. Assistance received under 100d is used for purchase of science materials for all ten (10) elementary schools in the system.

105. Assistance received under 100e is used to provide a variety of vocational course offerings at Ferndale High School for the regular day students and for adults in the evening.

106. The Federal financial assistance described in Findings 100 through 105 is or would be used to support programs which are infected by racial discrimination in the system of student and faculty assignment in the elementary schools of Respondent School District.

107. Financial assistance provided under Adult Basic Education (20 U.S.C. 1201-1213), and as much of the assistance provided under 20 U.S.C. 1241-81(a), 1305, 1322, and 1341-75, described in finding 105, as is provided through the District's Adult Education Programs, are not operated so as to subject the recipients to the illegal discrimination practiced by Respondent School District in its elementary and secondary schools.

Conclusions of Law

1. The Department of Health, Education and Welfare and The National Science Foundation have jurisdiction over the subject matter of this proceeding and over the persons of the Respondents under the applicable law; and the Hearing Examiner, by virtue of his designation, has full authority to preside over all proceedings, in this matter and to render an Initial Decision herein.

2. The requirements of Title VI of the Civil Rights Act of 1964, and the fourteenth amendment to the Constitution are coextensive with respect to the duty of a public school system not to discriminate on the grounds of race.

3. The requirements of the fourteenth amendment to the Constitution and Title VI of the Civil Rights Act of

1964 apply equally to all public school systems without regard to whether State or local law authorizes racial discrimination.

4. The selection of a new school site for the purpose and with the effect of segregating students on the basis of race constitutes illegal segregation for which the District is accountable.

5. In the State of Michigan when real estate is platted and sold, the legal effect of restricting the first parcel sold is to similarly restrict all parcels retained and subsequently sold without restrictions, if such later sales are in furtherance of a general plan of restriction.

6. The existence of two contiguous areas of residential land developed nearly simultaneously, one from which Negroes were excluded and one not, coupled with the conformance of a school boundary with the racial boundary separating the two areas, gives rise to an inference that the Board intended the result achieved when the schools serving the two areas were racially segregated.

7. A school board may not, consistently with the fourteenth amendment, to the Constitution, purposefully tailor the components of a neighborhood school attendance policy so as to conform to the racial composition of the neighborhoods in its school district.

8. A school district may not, consistent with the fourteenth amendment, make decisions which have the effect of instituting or perpetuating segregation of students because of a community attitude which is hostile to Negroes.

9. The intended and inevitable effect of the series of decisions by the District made with respect to school site selection and construction, the organization of the school system, the selection of attendance boundaries, and the ulti-

lization of facilities, as described in the foregoing Findings of Fact, has been to create and maintain racial segregation of elementary students in violation of the fourteenth amendment to the Constitution and Section 601 of the Civil Rights Act of 1964.

10. The policy and practice of the School District of assigning black and white faculty members, on the basis of face, to schools attended predominantly by students of the same race violates the fourteenth amendment.

11. The School District's present obligation, in order to overcome the effects of prior discrimination, is to assign faculty members so that no school is identifiable, by the racial composition of its faculty, as being tailored for a heavy concentration of black or white students.

12. The hiring and assignment of public school faculty members, including principals, on a racial basis, so as to establish schools that are racially identifiable by the composition of their faculties, deprives students of the right to be free of racial discrimination in the operation of the public schools, in violation of the fourteenth amendment.

13. The contemporaneous existence in the District of 9 elementary schools whose faculties and student bodies are almost exclusively white and one elementary school whose faculty is predominantly black and student body is exclusively black, creates a presumption of discriminatory faculty assignments which requires the school authorities to demonstrate the constitutionality of their procedures.

14. A finding that the School District has segregated the faculties of its elementary schools is alone sufficient to conclude that District has created *de jure* segregation.

15. That the School District was motivated in its creation and maintenance of a neighborhood school system by

racially neutral considerations does not constitute an excuse for the continuation of segregation, if the District concurrently favored neighborhood schools for illegal racial reasons.

16. The existence of discrimination in residential housing of the District may be inferred from evidence of the historic segregation, and of the existence and enforcement by Michigan courts of racially restrictive covenants.

17. Respondent School District is in violation of section 601 of the Civil Rights Act of 1964; the Regulation of the Department of Health, Education, and Welfare; and the Regulation of the National Science Foundation, in that it is maintaining and operating a school system which subjects persons to discrimination on the ground of race or color under programs of activities receiving or potentially receiving classes of Federal financial assistance administered by the Department of Health, Education, and Welfare and The National Science Foundation.

18. The illegal student and faculty assignment practices of Respondent School District have not been shown to have a discriminatory effect upon activities with respect to which it receives or could receive Federal financial assistance under the authorization for Adult Basic Education—20 U.S.C. 1201-1213, and to the extent such activities are for adults and not for secondary school children, under the authorizations for Vocational Education, (20 U.S.C. 1241-81(a), 1301-05, 1322, 1341-75).

19. Except as noted in conclusion 18, the existence of the illegal segregation of students and faculty in the elementary schools of the District so infects the rest of the system as to render discriminatory all aspects of the operation of Respondent School District's system of elementary and secondary instruction with respect to which Fed-

eral financial assistance administered by the Department of Health, Education, and Welfare and The National Science Foundation is paid or could be paid but for noncompliance with Title VI of the Civil Rights Act of 1964.

Order

1. It Is Ordered that Federal financial assistance administered by the Department of Health, Education, and Welfare, and The National Science Foundation under the following authorizations:

School Construction in Federally Affected Areas	20 U.S.C. 631-645
School Assistance in Federally Affected Areas	20 U.S.C. 236-240
Bilingual Education (Title VII, ESEA)	20 U.S.C. 880b-880b-6
School Construction and Operation in Case of Certain Disasters	20 U.S.C. 241-1, 646
Teacher Corps	20 U.S.C. 1101-1107a
Surplus Real Property	20 U.S.C. 484(j)
Drop-Out Prevention	20 U.S.C. 887
Education of Children of Low-Income Families (Title I, ESEA)	20 U.S.C. 241a-244
Children of Migratory Workers	20 U.S.C. 241c(a)(6), 241e(c)
School Library Resources, Textbooks, etc. (Title II, ESEA)	20 U.S.C. 821-827

Supplementary Education Centers and Services (Title III, ESEA)	20 U.S.C. 841-848
Education of Handicapped Children (Title VI, ESEA)	20 U.S.C. 871-877
Strengthening Instruction in Critical Subjects (Title III, NDEA)	20 U.S.C. 441-444
Strengthening Instruction in Humanities and Arts	20 U.S.C. 951, 952, and 961
Guidance Counseling and Testing (Title V, NDEA)	20 U.S.C. 481, 485
Vocational Education Acts	20 U.S.C. 1241-81(a), 1301-05, 1322, 1341-75
Surplus Personal Property	40 U.S.C. 484(j)

NSF Cooperative College School Science Program and any other provision of law administered by either such agency, for which Respondent School District would otherwise be eligible but for its noncompliance with Title VI of the Civil Rights Act of 1964 for use in any program of elementary and secondary school instruction other than education programs for adults, conducted by Respondent School District, be terminated and refused to be granted or continued to Respondent State Agency and to Respondent School District. This termination and refusal to grant shall remain in force until the Respondent School District corrects its noncompliance with the requirements imposed by or pursuant to the applicable Regulations issued pursuant to Title VI of the Civil Rights Act of 1964, and satisfies the responsible official of the Depart-

ment or Agency from which assistance is requested that it will fully comply in the future with all applicable requirements imposed by or pursuant to such Regulation.

2. No expenditure described in the preceding paragraph, by or in behalf of Respondent School District, shall be recognized for any purpose until the Respondent School District satisfies the responsible official of the Department or Agency from which such assistance is requested that it has corrected its noncompliance and will fully comply with the applicable Regulation under Title VI of the Civil Rights Act of 1964.

3. This Initial Decision is subject to independent review in the Department of Health, Education, and Welfare and The National Science Foundation upon motion of any party, or upon exceptions being filed by a party in accordance with the following Regulations: Department of Health, Education, and Welfare (45 CFR 81.103, 81.106); National Science Foundation (45 CFR 611.10).

/s/ Horace H. Robbins
Hearing Examiner

Washington, D.C.
September 28, 1970

CERTIFICATE OF SERVICE

I hereby certify that on September 28 1970, I personally mailed copies of the foregoing Initial Decision to the following:

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September 28, 1970

RULING ON EXCEPTIONS AND ORDER OF THE REVIEWING AUTHORITY (CIVIL RIGHTS)

Administrative Proceeding

In The

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

National Science Foundation

In the Matter of: School District of the City of Ferndale, Michigan (hereinafter called "School District") and State of Michigan Department of Education (hereinafter called "State Agency"), Respondents.	Docket No. CR-866

CR-866 FERNDALE

I. *Background*

The School District of the City of Ferndale (hereinafter called "Respondent") was created prior to 1920 and encompassed the City of Ferndale as well as a portion of Royal Oak Township. At the time of the hearing, the Respondent District included not only most of the City of Ferndale, but also adjacent areas under other municipal governments: The City of Pleasant Ridge, part of the City of Oak Park, and part of Royal Oak Township (east of Wyoming Avenue and south of North End Avenue).

The School District operates public elementary schools in each of these municipalities. The senior high school and the junior high school are in the City of Ferndale. The Grant School, whose attendance area comprises a significant portion of Section 33 of Royal Oak Township, presents the primary issue in this case.

Royal Oak Township was the original overall municipal unit, some thirty-six miles square, out of which the villages and cities were organized. The Township abuts directly on the City of Detroit (8-Mile Road). Only a fragment of the original Township area remains in the Township government: a small area on 8-Mile Road and a small area at Greenfield and Ten Mile Road. That part of the Township on Eight Mile Road east of Wyoming is the "Grant neighborhood", hereinafter referred to as the "Grant area". (Royal Oak Township west of Wyoming Avenue is the Carver district, not the Ferndale School District.)

The Grant area is a black residential neighborhood; the rest of the Ferndale School District is substantially a white residential area, although there is an area near Nine-and-a-Half Mile Road and Goodrich Avenue which has a black enclave. In addition, a scattered enrollment of black students throughout the elementary system indicates some blacks residing in other parts of the Respondent District. The Grant area is presently separated from other residential areas in the School District by non-residential property, i.e., there is no residential contiguity with other parts of the Ferndale School District. When the Grant School was established, the characteristics of the contiguous areas had not been determined.

The record reflects that there was substantial population growth throughout the Respondent School District during the ten year period from 1920-1930. During this period of

time, the Respondent built several new schools and additions to other schools. It is uncontradicted in the record that it was Respondent's policy to build schools so that students would have to walk no more than one mile to school.

In 1925, Respondent opened a kindergarten through eighth grade school in the Leggett Farms area (not then within Ferndale city limits) which was named Jefferson School. During that school year, students from the Grant area attended Jefferson. In 1926, Respondent opened a kindergarten through sixth grade school in the Grant area which was named U.S. Grant School. At that time, the approximately 126 Grant students were all black with the exception of one white male. All of the teaching staff was black.

Simultaneously with the above building program, Respondent was gradually closing out Ridgewood School because it was in the way of a highway improvement program. There was testimony and evidence in the record regarding community feelings about the closing of Ridgewood School. The record also contains testimony concerning the residents' feelings on Grant School.

The School District operates ten elementary schools, a junior high school, and a senior high school. Findings of Fact No. 9, Schools and Enrollments.) In the 1968-69 school years, there were 4,312 elementary school students, of whom 396 were black. All but 31 of the black elementary students attended the Grant School which had an all-black student body. In the same school year, Respondent employed approximately 332 full-time teachers, of whom 30 were black. Of these 30, eleven were assigned to the Grant School, which was the only school in the District where majority of the full-time teachers were black (eleven out of nineteen).

II. *Discusson of the Law*

For us this is a case of first impression in that at no time in its history was the Respondent School District compelled by law to separate the races in its system. On the contrary, the record suggests that the state law prohibited segregation in the education of its citizens.[1]

The question presented by this proceeding does not deal with the legal responsibility of a school district to dismantle a formerly required dual school system and thereby eliminate all vestiges thereof by establishing a unitary system. Moreover, the traditional concept of *"de jure* segregation" as designated and applied to those school systems formerly required by law to segregate is not applicable to the facts herein. What is in issue here is what conduct of a school district, through its appropriate agents, constitutes a violation of its school children's constitutional rights, even though such conduct is not compelled by law. In turn, a response to this issue calls for an examination of the interpretation and application of the concept of *"de jure* segregation".

In addition to the alleged segregatory establishment and maintenance of one of the Respondent's elementary schools, and the assignment practices regarding its faculty, the Government's case against the Respondent is based upon the alleged concurrent discriminatory acts of entities and persons other than the Respondent. Coupled with this is the fact that there exists no law requiring the Respondent to conform or capitulate to the alleged discriminatory acts of others in the establishment, operation, or maintenance of its school system. Consequently

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[1] See Michigan Compiled Laws 1948, Secs. 344.26 & 359.9; *People* v. *Board of Education of Detroit*, 18 Mich. 399, 408 (1869).

we are called upon by the Government to consider two sources of alleged discriminatory conduct: One, conduct of Respondent itself; and two, conduct of those other than the Respondent. This, in turn, poses two questions: One, under what circumstances can we consider conduct of a school district as constitutionally impermissble; and two, under what conditions does the discriminatory conduct of others become relevant and cogent to the dispositions in a proceeding such as this?

The Respondent, being a corporate public body organized and existing under state law, and vested with the control and management of the public schools of the area within its jurisdiction, is a state agency or instrumentality. As such, its official action is state action. It follows that if its official action is discriminatory, then, as state action, it is prohibited by the 14th Amendment of the Constitution of the United States. Such a premise is so fundamental that it needs no expansive discussion herein. It makes no logical difference whether a state agency or instrumentality officially indulges in discriminatory acts on its own or under compulsion of local law—the constitutional violation persists. The discriminatory conduct, whether compelled by local law or, failing such compulsion, is performed in an official capacity, still has the force of state action, and as such is "*de jure*" in both the technical and practical sense. Both forms of conduct are exercised by dint of and under the force and authority of law. Thus, in response to the first question posed above, we hold that any official action by a school district itself which has a segregatory purpose or objective is the proper subject matter of "*de jure segregation*", no matter that such action was not or is not compelled or required by local law. Furthermore, the existence of a segregatory purpose or objective constitutes an intent to discriminate, and when

such intent is so manifested in the official actions and educational policies of a school district there is "*de jure*" conduct in violation of the constitutional prohibitions against discrimination for which the said school district has the positive and affirmative duty to correct and amend by any appropriate means.

In response to the second question posed above, if a school district, by its official actions and educational policy, in whole or in part, purposefully participates in, contributes to, or accommodates the discriminatory practices of others, public or private, the segregatory purpose is extant, and the intent attendant thereto makes any resultant segregation in that school system *de jure*. It is in this respect that the discriminatory conduct and practices of those other than the school district assume importance. The primary and essential inquiry focuses upon the official practices of the district itself to determine whether such practices purposefully "aid, underwrite or abet" discriminatory conduct and attitudes existing elsewhere within that district's jurisdiction. If such school district's practices or policies do exist, then the resultant school segregation cannot be attributed to so called "*de facto*" or adventitious circumstances such as fortuitous racial housing patterns; it is *de jure* segregation. Nor can the district, in such a situation, disclaim the blame for such segregation by shifting it upon the ostensibly authorized actions of other public agencies over which the district had no control. Moreover, as enumerated in the conclusions of law in *U. S. vs. School District 151 of Cook County, Illinois*, 301 F .Supp. 201, 230-231 (1969):

> "14. A school board may not, consistetly with the Fourteenth Amendment, maintain segregated schools or permit educational choices to be influenced by a policy of racial segregation *in*

order to accommodate community sentiment or the wishes of a majority of voters . . .

"15. A school board may not, consistently with the Fourteenth Amendment, *purposefully tailor* the components of a neighborhood school attendance policy so as *to conform to the racial composition of the neighborhoods in its school district . . .*

"16. A school board may not, consistently with the Fourteenth Amendment, *construct new schools or expand existing ones for the purpose* and with the effect of creating or preserving racial segregation of pupils; nor may it select sites for new schools for the purpose and *with the effect of incorporating in the school system existing residential segregation . . .*

"17. An ostensibly neutral school attendance zone policy, which may be educationally justifiable in the circumstances of some school districts, is impermissible where it *represents a policy by school authorities of building the effects of residential racial segregation into the school system . . .*" (Emphasis added)

III. *Exceptions*

Respondent has submitted forty-three (43) exceptions to the Hearing Examiner's Findings of Fact. As an appellate forum, our primary function and responsibility is to rule on matters of law, and accept the findings of fact by the Hearing Examiner unless they are unsupported by the record or the weight of the evidence is clearly to the contrary. Although the testimony offered by each party may have the effect of contradicting or controverting the evidence of the other party's factual position in this proceed-

ing, the matter of the credibility of witnesses, which the record before us cannot reflect, is solely within the purview of the Examiner, and as such beyond our province. Thus, if any finding of fact is directly supported by the record of this proceeding, or if any such finding constitutes a fair and reasonable inference to be drawn from such record, we are constrained to accept such finding. On the other hand, the legal effect or interpretation to be given such facts, or the law to be applied regarding such facts is within our domain and responsibility, and in that respect we are free, after careful consideration, to make our own determinations and rulings.

Because of the volume of exceptions taken by the Respondent to the Hearing Examiner's Findings and Conclusions, and because most of the exceptions are addressed to the Respondent's disagreement with Findings of Fact, we will not attempt to repeat, itemize, interpret, or characterize each exception. Instead, we shall proceed to respond and rule on each exception in the chronology in which it appears in the Respondent's pleading. To facilitate this process, the exceptions will be numbered consecutively in the order in which they have been submitted by the Respondent, and we shall indicate the Examiner's Finding or Conclusion by its number to which the corresponding numbered exception is addressed.

IV. *Rulings on Exceptions*

A. *As to Findings of Fact*

1. Exception 1 to Finding 19

This exception is denied.

This exception does not controvert the Finding and as such is not responsive thereto. In fact, the wording of the exception admits that there was no "acute need" shown to build the Grant School, which is the essence of this Finding.

2. Exception 2 to Finding 20.

This exception is denied.

The record supports this Finding. (See Tr. 124-25; G-94: G-132 and D-29, p. 2)

3. Exception 3 to Finding 21.

This exception is denied.

Although the record reflects, *inter alia,* that there may have been good educational reasons for the establishment of Grant School, the indications as to the necessity for its construction do not exist, assuming that necessity is something you cannot reasonably do without. The construction of the Grant School may have been ostensibly justified, but the record supports the Finding that its erection was not educationally necessary.

The removal of all of the black elementary students from the Jefferson School to the Grant School when they could have been educationally accommodated as well at Jefferson, the ability of existing schools to educate the Grant area elementary school children, and the walking

distances for the Grant area children to Jefferson being similar to that already established throughout Respondent's system all indicate that no compelling, or imperative need existed for the establishment of the Grant School at the time it was erected. (See references to the record in our response to exceptions 2, 16, and 17 to Findings 20, 36, and 37 respectively)

4. Exception 4 to Finding 23.

This exception is denied.

Logic dictates that the subdividing of rooms in a school does not increase the overall seating capacity per child. Also, the transcript references by Respondent in support of this exception neither support nor relate to this exception. Moreover, Respondent failed to except to Finding 24, which dealt with the definition of the "Unit Theory" of education as merely to provide " . . . that class size (and therefore room size) should vary with the type of activity or subject matter being taught or supervised." This failure of exception belies Respondent's position in this exception because the definition in Finding 24 does not deal at all with capacity. Consequently, Respondent's failure to except thereto inferentially destroys Respondent's argument that ". . . the unit system was to . . . increase its capacity . . ."

5. Exception 5 to Finding 25.

This exception is denied.

Although there existed other ostensible reasons of educational justification for the building of Grant, such as school population projections, the complementing of the existing neighborhood school policy, the decrease in walking distances to school for the elementary school children of the Grant area, and the "Unit Theory" experiment, the

record supports a reasonable inference that the "primary" purpose for building the Grant School was to segregate the black elementary school children from the white children. Also, the record clearly supports that part of this Finding which holds that the Board was aware that the estblishment of Grant would separate, and thus segregate the black children from the white children, and that the black community knew that the Grant School would segregate the black children, and objected to it.

That a segregatory purpose existed in the Board's action in establishing the Grant School is implicit from the record. The Board's awareness of the segregatory result of its actions in erecting Grant, the removal of all the black elementary students from the Jefferson School to Grant School at a time when room for them existed in Jefferson, the establishment and assignment of an all-black faculty at Grant, the Board's apparent preoccupation with establishing Grant School over and above and at the expense of the consideration of school construction needs more pressing elsewhere in the District, the existence of local racial covenants, known to the Board, interspersed in areas other than the Grant area, which formed a discernible boundary in relation to the Grant area portending it as a black residential pocket in the District coupled with Respondent's neighborhood school policy, all permit the inference that the Board's primary purpose in erecting the Grant School was to effect a segregatory result and thus segregate the black elementary children of the Grant area. (See Tr. 923-24; 926-27; G-45, p. 2; G-55, p. 2; G-94; G-132; G-145, pp. 1-37; G-146; D-28, pp. 2-3; D-29, p. 2 and Findings 61, 63, and 72 which are not contested by the Respondent in its exceptions)

6. Exception 6 to Finding 26.

This exception is denied.

The record supports this Finding. (See Tr. 229; 233-34 and G-45, p.2)

7. Exception 7 to Finding 27.

This exception is granted.

Although the Klan was active in the School District at the time the decision was made to build the Grant School, there is no evidence in the record that its activities were directed to intimidate black residents of the District. (See Tr. 237-39; 247-48; 863-65; G-54 and D-16)

8. Exception 8 to Finding 28.

This exception is granted.

This Finding is unsupported by the record insofar as it attributes racial hostility to "many of the residents" in the areas in question. However, the record does support some racial hostility existing in these areas. (See Tr. 232-34 and G-45, p. 2)

9. Exception 9 to Finding 29.

This exception is denied.

The record inferentially supports this Finding. (See Tr. 355-59)

10. Exception 10 to Finding 30.

This exception is denied.

This exception does not controvert the Finding and as such is not responsive thereto. Also, the record supports this Finding. (See Tr. 123, 133-34, and G-128-30).

11. Exception 11 to Finding 31.

This exception is denied.

This exception does not controvert the Finding and as such is not responsive thereto. The fact that attendance

boundaries were known to one person is not an indication that such boundaries were clearly defined. Also, the record supports this Finding. (See Tr. 42, 43 and 269)

12. Exception 12 to Finding 32.

This exception is denied.

The record clearly reflects that the basis for assignment to the Grant School was primarily the residential area of the black elementary school children in the Grant area. The Board knew that the Grant area was primarily a black residential area and, under the social circumstances prevailing in the District, would probably continue as such. Moreover, the lack of fixed, definite school attendance boundaries in the Grant School area permits an inference that the Board's purpose was to provide an operational and latitudinal device to include and insure the attendance of all the black elementary school children residing in and around the Grant area at the Grant School under a nebulous Grant School attendance zone. Thus from these facts, coupled with the Board's awareness of the segregatory result of its actions in erecting Grant, it can be reasonably inferred that the basis for assignment to the Grant School was primarily race rather than residential. (See also, our response above to exception 5 to Finding 25 and the references to the record therein)

13. Exception 13 to Finding 33.

This exception is granted.

According to the record, Grant School had an initial capacity of 160 students (at 40 students per room), and it opened with an enrollment of 124 students which was about 23% below capacity. Furthermore, it would be reasonable to assume that the Board was aware of the number of elementary school children then residing in the

Grant area, and the number of black children of the Grant area which it intended to transfer from the Jefferson School to the Grant School. As such, the Board had a reasonably correct estimate of the black student body "immediately expected" at Grant, and the school's capacity was at least 20% above the number of black students "immediately expected". (See G-94 and G-132)

It may be postulated that the 23% capacity in excess of *expected* enrollment was the perfunctory formula for growth anticipation in designing schools, that schools were designed for an initial optimum enrollment of 77%, and consequently the 23% capacity over *current* enrollment should not be considered in determining the contemplated current capacity of a school because the 77% initial enrollment at Grant represented just what the Board contemplated. Apart from the fact that most of Respondent's schools were operating in the vicinity of 24% below capacity when Grant was built, there is no evidence in the record that there was any formula for anticipated enrollment growth, and thus such a position as mentioned about would be highly tenuous and speculative.

14. Exception 14 to Finding 34.

The exception is denied.

The record inferentially supports this Finding. (See Tr. 923-24 and 926-27)

15. Exception 15 to Finding 35.

This exception is denied.

What has been said above in response to exceptions 5 and 12 to Findings 25 and 32 respectively, applies herein to this exception. Having ruled, in exceptions 5 and 12, that there was a segregatory purpose in establishing the Grant School, and that the basis of assignment thereto was

race, this finding of intent to segregate is based upon those segregatory purposes attributed to Respondent's Board in establishing the Grant School. The existence of a segregatory purpose in official school board actions and educational policies constitutes an intent to discriminate.

16. Exception 16 to Finding 36.

This exception is granted.

The Board's action, in establishing the Grant School was not *totally inconsistent* with its stated policy of locating schools on the basis of need, safety, accessibility, and economy. However, this Finding should be read and considered in conjunction with Findings 37 and 38 below which we believe to be supported by the record, and which indicate that little consideration was afforded the needs of the District as a whole in the establishment of Grant School. **(See D-1)**

17. Exception 17 to Finding 37.

This exception is denied.

The record indicated that the greater need for more space per pupil existed elsewhere in the District. Also, this exception does not controvert the Finding insofar as it postulates "greater need" existing elsewhere in the District. (See G-94; G-132 and D-29, p. 2)

18. Exception 18 to Finding 37.

This exception is denied.

The record indicates that sufficient capacity (space per pupil) for the Grant area students existed in the Jefferson School when the Grant School was erected.

19. Exception 19 to Finding 39.

This exception is denied.

The record supports this Finding. Also, the transcript references by Respondent in support of this exception neither support nor relate to this exception. (See G-22 and G-46)

20. Exception 20 to Finding 40.

This exception is denied.

This Finding is supported by the record. (See D-29; G-22; G-46; G-94; G-131, p. 2 and G-132)

21. Exception 21 to Findings 41 through 50.

This exception is denied.

These Findings are supported by the record. (See D-29; G-22; G-46; G-94; G-131, p. 2 and G-132)

22. Exception 22 to Finding 51.

This exception is granted in part and denied in part.

The record reflects that during the period between 1930 and 1936, only the Washington School was either at, or over, capacity. However, the Jefferson and Taft Schools were below capacity during the Thirties and early Forties, and space was available at that time at these two schools to alleviate overcrowding at the Grant School. Also, this exception loses much of its force and effect by Respondent's failure to except to Finding 52 which holds that the overcrowded situation at the Grant School could have been alleviated by transfers to the Jefferson School. (See GG-22; G-46; G-94; G-131, p. 2 and G-132)

23. Exception 23 to Finding 54.

This exception is denied.

This Finding is supported by the record. (See G-22; G-45; pp. 1-3; G-46, pp. 1-2; G-49; G-131, p. 2 and G-132)

24. Exception 24 to Finding 55.

This exception is denied.

The record supports this Finding. (See G-45, p. 2 and G-46, pp. 1-2)

25. Exception 25 to Finding 56.

This exception is denied.

The record supports this Finding. (See G-46, p. 2)

26. Exception 26 to Finding 57.

This exception is denied.

The record supports this finding. (See G-94)

27. Exception 27 to Finding 62.

This exception is denied.

The record supports this Finding. (See G-55, p. 2)

28. Exception 28 to Finding 65.

This exception is denied.

The record supports this Finding. (See Tr. 313-15 and G-46, p. 1)

29. Exception 29 to Finding 66.

This exception is denied.

The record inferentially supports this Finding. (See Tr. 395-403; 923-24 and 926-7)

30. Exception 30 to Finding 68.

This exception is denied.

This exception does not controvert the Finding and as such is not responsive thereto. Also, that part of the record which supports Finding 34 above is supportive of this Finding. (See Tr. 923-24 and 926-27)

31. Exception 31 to Finding 69.

This exception is denied.

The record inferentially supports this Finding. (See Tr. 133-34)

32. Exception 32 to Finding 70.

This exception is denied.

This exception does not controvert the Finding and as such is not responsive thereto. Also, this Finding is correct. (See, *Shulte vs. Starke,* 238 Mich. 102, 103 (1927); and *Sanborn vs. McLean,* 206 N.W. 496 (1925))

33. Exception 33 to Finding 71.

This exception is granted.

The record does not reflect or suggest that racial covenants were "widely used". However, racial covenants were not uncommon in the District in that the record reflects that 30% of the residential property in the District was encumbered with racial covenants. (See Supp. Tr., 3 April 1970, p. 18)

34. Exception 34 to Finding 73.

This exception is granted.

The white racial composition of the other subdivisions not having racial covenants attests to the fact that the deterrent found by the Examiner did not seem to exist. (See G-145, pp. 1-37 and G-146 which designate those areas of the District which were restricted and those which were not. These exhibits considered together with G-8, and the racial composition of the other subdivisions within section 33, inferentially indicate that the failure to file racial restrictions on these other subdivisions did not deter the purchase of lots in these unrestricted subdivisions by white buyers).

35. Exception 35 to Finding 74.

This exception is granted.

This exception is granted only insofar as the Finding states that residential segregation "substantially conformed" to previously enforceable racial covenants. Having ruled on Exception 33 to Finding 71 that racial covenants were not "widely used" in the District, it would offend logic to hold that residential segregation "substantially conformed" with something that did not entirely exist throughout the District. In fact, some blacks lived and are presently residing in the Northeast section of the District in the Harding School area. (See Tr. 265 and G. C. Br. pp. 8, 50, and 51)

However, according to the record, the residential housing pattern of the Grant area was indeed influenced by patterns of previously enforceable racial covenants elsewhere. The record reflects that those affected areas in which racial covenants existed, coupled with areas undeveloped or subsequently zoned for commercial and industrial use, effectuated and formed an eventual discernible ring around the Grant area, where no racial covenants existed, thereby restricting the mobility of the Grant area and influencing its identity as a black residential area. Also, those interspersed areas lacking racial restrictions were themselves girded by racially restricted areas. (See G-145, pp. 1-37 and G-146. See also, Finding 72, which is not contested by Respondent in its exceptions.)

36. Exception 36 to Finding 75.

This exception is granted.

This exception is granted only insofar as the Finding states that the racial covenants contributed "substantially" to the extant residential segregation. However, the racial covenants did in part contribute to the residential

racial housing patterns that currently exist in the District. Also, what has been said above in response to exception 25 regarding the influence of racial covenants in the District applies herein.

37. Exception 37 to Finding 76.

This exception is granted in part and denied in part.

This exception is granted only insofar as the Finding limits itself to "five (5) black families that now live in formerly all white areas." The record simply does not support this part of the Finding. However, the record does permit an inference that the residential segregation pattern of the pre-1930's substantially exists today. The number of the District's black students in the Grant School coupled with the District's utilization of the neighborhood school policy since 1927 fixes the racial character of the Grant area, then and now.

38. Exception 38 to Finding 77.

This exception is denied.

The record supports this Finding. (See Tr. 729; 767; 805-807; 817 and 820)

39. Exception 39 to Finding 87.

This exception is denied.

The record supports this Finding. (See Tr. 660)

40. Exception 40 to Finding 92.

This exception is denied.

This Finding is supported by the record (See Tr. 1118). However, the record also reflects that at least some of the land in question was not suitable for residential purposes regardless of race because of its topography and natural condition.

41. Exception 41 to Finding 93.

This exception is granted.

According to the record, the inference in this Finding is attentuated. In fact, the Government admits a rational basis for land uses in the District. The matter of motivation in the control of land use is overwhelmingly indicated to be economic rather than racial. (See G. C. Resp. to Except. p 57; Tr. pp. 973 *et seq.;* D-37 and D-39)

42. Exception 42 to Finding 94.

This exception is denied.

The record supports this Finding. (See G-108)

43. Exception 43 to Finding 95.

This exception is granted in part and denied in part.

The language of this Finding is ambiguous, as suggested by Respondent, because the Finding is so worded as to indicate that the political boundaries of Royal Oak Township were set up at the time the attendance area was established at the Grant School. According to the record, Respondent is correct that such boundaries were set up after the Grant School was "established". (See G.C. Resp. to Except., p. 66; Tr. 970 *et seq.* and 1033-34). However, that part of the Finding regarding the Board's "establishment" of the Grant School attendance area to conform to the pattern of racial segregation in residential housing, and the Board's racial practice in the assignment of faculty to the Grant and other schools is supported by the record.

The Board's awareness of the racial complexion of the Grant area, the Board's awareness of racial covenants and of the segregated housing patterns existing and developing in the District, the Board's awareness of the segrega-

tory result in which its actions in establishing the Grant School would have, the Board's dubious actions in establishing Grant in the light of existing educational needs throughout the District, and the questionable lack of a definite school attendance area for the Grant School are all cogent indications that the Board established the attendance area served by the Grant School to conform to the pattern of racial segregation in housing. Also, what has been said above in response to exceptions 21, 25, 32, 35, 37, and 38 applies herein. (See Tr. 923-24 and 926-27)

Findings 61, 63, and 64, which are not contested by Respondent in its exceptions, point out that none but black full-time classroom teachers were assigned to Grant until 1964, and not until 1949 were any black teachers assigned to teach anywhere in the District other than Grant. Also, the record indicates that the Boards' action in not assigning black faculty to schools other than Grant was in capitulation to a hostile community attitude to blacks teaching white children. (See Tr. 42-43; 269; 313-15 and G-46, p. 1)

B. *As To Conclusions of Law*

44. Exception 44 to Conclusion 4.

This exception is denied.

This exception does not controvert the Conclusion and as such is not responsive thereto. This Conclusion, unlike the wording of the exception, is not based upon nor inclusive of "racially neutral motives and standards". Also, the Conclusion speaks in terms of "purpose" and "effect" and not merely "effect" as does the wording of the exception. This Conclusion is a correct statement of the law, and, inasmuch as the Examiner properly found that the primary purpose for the establishment of the Grant

School was to segrate the black elementary school children, in the Grant area from the white children, this Conclusion applies herein. (See also, our response below to exception 54 regarding "racially neutral motives")

45. Exception 45 to Conclusion 5.

This exception is denied.

This Conclusion is correct. See *Schulte vs. Starke,* 238 Mich. 102, 103 (1927); and *Sanborn vs. McLean,* 206 N.W. 496 (1925). These two cases read together indicate that the law of Michigan, at or around the time the Grant School was established, was as the Examiner found in his Conclusion.

46. Exception 46 to Conclusion 6.

This exception is denied.

A conclusion of law is a statement which speaks in terms of a legal right or responsibility or articulates a principle of law. As such, the statement excepted to herein is a conclusion of law and not a conclusion of fact. Although the cases cited by the Government in support of this Conclusion do not enunciate this principle, it is a perfectly good statement of law and consonant with our discussion regarding the law of this proceeding. If the facts regarding conformance of a school boundary with the racial boundary, as stated in this Conclusion, do exist, then the inference of intent drawn from them is permissible, if indeed not required, as a matter of law.

The facts upon which this Conclusion is based reside in Finding 72 which is not contested by Respondent in its exceptions, and in that part of Finding 95 which properly held that the Board established the Grant School attendance area to conform to the pattern of racial segregation in residential housing in the District.

47. Exception 47 to Conclusion 8.

This exception is denied.

This exception does not controvert the Conclusion and as such is not responsive thereto. This Conclusion, unlike the wording of the exception, is not based upon nor inclusive of "racially neutral motives and standards". Here again, as in exception 44 to Conclusion 4, Respondent is contesting the facts upon which the Conclusion based. The Conclusion is a correct statement of the law, and the facts upon which it is based reside in Findings 55 and 65 which we upheld by denying exceptions thereto. (See also, our response below to exception 54 regarding "racially neutral motives")

48. Exceptions 48 to Conclusion 9.

This exception is denied.

The statement made in Conclusion 9 speaks in terms of a legal principle and as such is a conclusion of law. (See, *U.S. vs. School District 151 of Cook County, Illinois,* 301 F. Supp. 201, 230-231 (1969))

The facts upon which this Conclusion is based reside in Findings 20, 21, 25, 30, 31, 32, 35, 51, 54, 56, 57, 60, 62, 65, and 66 which we upheld by denying exceptions thereto; Findings 52, 61, 63, and 64 which are not contested by Respondent in its exceptions; and that part of Finding 95 which properly held that the Board established the Grant School attendance area to conform to the pattern of racial segregation in residential housing in the District. (More particularly, see D-28, pp. 1-2; G-45 and G-46)

49. Exception 49 to Conclusion 10.

This exception is denied.

It is fundamental and basic that the assignment of faculty on the basis of race, to schools attended predomi-

nantly by students of the same race, is an unreasonable classification and thus discriminatory and in violation of the students' 14th Amendment rights to an unsegregated education, whether the school system be dual or unitary. In fact, if such an assignment by race does exist, the system cannot, as a matter of law, be said to be a unitary system.

The facts upon which this Conclusion is based reside in Findings 61, 63, and 64 which are not contested by Respondent in its exceptions, and Findings 62, 65, and 66 which we upheld by denying exceptions thereto.

50. Exception 50 to Conclusion 11.

This exception is denied.

As indicated in our discussion of the law regarding this proceeding, any official action of a school board with a purpose to discriminate, including the assignment of faculty, which results in segregation, constitutes *de jure* segregation in violation of the 14th Amenment. (See *Spangler vs. Pasadena City Board of Education,* 311 F. Supp. 501, 523 (1970))

The facts upon which this Conclusion is based reside in Findings 61, 63, and 64 which are not contested by Respondent in its exceptions, and Findings 62, 65, and 66 which we upheld by denying exceptions thereto.

51. Exception 51 to Conclusion 12.

This exception is denied.

What has been said above in response to exception 50 applies herein to this exception.

52. Exception 52 to Conclusion 13.

This exception is denied.

The statement excepted to speaks in terms of a legal adjectival responsibility and is thus a conclusion of law.

Presumptions are rules of law. (See *U.S. vs. School District 151, of Cook County, Illinois,* 301 F. Supp. 201, 228, (1969)).

53. Exception 53 to Conclusion 14.

This exception is denied.

What has been said above in response to exception 50 applies herein to this exception.

54. Exception 54 to Conclusion 15.

This exception is denied.

The following principle enunciated in *Hobson vs. Hansen* is instructive.

> "But the fact that the Board believes in neighborhood schools for racially neutral reasons which alone suffice to explain the initiation and retention of that policy does not settle the matter; for these facts in no way cancel the possibility that the Board has concurrenly favored it for racial reasons which are forbidden. If a valid purpose is in fact joined by an outright segregatory purpose, the court has no doubt that a *de jure* case has been established." 269 F. Supp. 401, 418 (1967). See also *U.S. vs. School District 151 of Cook County, Illinois,* 301 F. Supp. 201, 231 (1969).

The facts upon which this Conclusion is based reside in Finding 25 which we upheld by denying exception thereto.

55. Exception 55 to Conclusion 16.

This exception is denied.

See *Spangler vs. Pasadena City Board of Education,* 311 F. Supp. 501, 522, (1970). The facts upon which this Conclusion is based reside in Findings 70 and 77 which we upheld by denying exceptions thereto; Finding 72

which is not contested by Respondent in its exceptions; and those parts of our rulings on Findings 71 and 75 regarding the encumbrance of 30% of the residential property in the District with racial covenants, and the influence these covenants had in contributing to the racial housing patterns in the District.

56. Exception 56 to Conclusion 17.

This exception is denied.

What has been said above in response to exception 48 applies herein to this exception.

57. Exception 57 to Conclusion 19.

This exception is denied.

See our opinion in *Jasper,* CR-774, regarding the application of the *Taylor vs. Finch* case and the "infection theory".

C. General Exceptions As To The Introduction And Reception Of Certain Evidence

1. Respondent excepts to the admission of certain material dealing with annexation and zoning.

This exception is denied.

Although the matter of Respondent's conformance with the discriminatory acts of other public or political entities in the District was not alleged in the Government's Notice of Opportunity for Hearing, the record reflects that Respondent was made aware, at a pre-hearing conference, that such an issue would be raised at the Hearing. Moreover, at the Hearing, Respondent did not deny such awareness. Furthermore, Respondent does not object to such evidence on the basis of surprise; rather its objection is based upon the alleged irrelevancy and Respondent's fi-

nancial inability to refute or test the veracity and cogency of such evidence.

In accordance with our discussion of the law regarding proceedings such as this, the alleged discriminatory conduct of others, public or private, becomes or is relevant to determine whether Respondent School District has by its official actions and educational policy purposefully participated in, contributed to, or accommodated such conduct. As such, the evidence objected to by Respondent herein was relevant to the previously announced theory of the Government's case; to wit, that Respondent through its official actions and policies conformed with the alleged discriminatory actions and policies of the other politcal bodies within its District.

In any event, the force of this exception is dissipated in that: One, we granted Respondent's exception to the Finding regarding racial motivations, in land use zoning; and two, we feel that the annexation evidence objected to herein is neither necessary, essential, nor of any consequence to the ultimate disposition of this proceeding.

2. Respondent excepts to the admission of Government Exhibits 145 and 146 dealing with building and use restrictions on certain properties.

This exception is denied.

Here again Respondent does not object to such evidence on the basis of surprise; rather its objection is based upon the admission of these exhibits because of the failure of an alleged foundation that the restrictions evidenced by these exhibits were ever actually enforced.

As stated in *Spangler vs. Pasadena City Board of Education:*

> "The existence of residential segregation based upon discrimination may be inferred from evidence

of the existence and enforcement by courts in the past of racially restrictive covenants." 311 F. Supp. 501, 522 (1970).

The Examiner stated that he would accept these exhibits into the record for the weight they deserved. This statement coupled with his Conclusions of Law 5, 6, and 16 based upon Findings 70 and 72 (not excepted to) indicate that the weight afforded these questioned exhibits was in accordance with the principle stated above in the *Spangler* case. Furthermore, the Examiner's position in Finding 70 regarding restrictive covenants is supported by *Shulte vs. Starke* and *Sanborn vs. McLean,* referred to in our ruling on said Finding.

With regard to those restrictions, if any, which did not come into existence until after the decision was made to build the Grant School, we will assume that the Examiner considered and gave weight only to those restrictions, in these exhibits, which were in existence at the time the Grant School was established. Thus, we feel that the Examiner accorded these exhibits their appropriate relevance.

3. Respondent excepts to the admission of certain evidence regarding F. H. A. policies and practices.

This exception is denied.

Even though the Examiner made Findings regarding F. H. A. policies, none of his Conclusions of Law make specific reference to the complained of F. H. A. evidence. In fact, in the introductory remarks in his Initial Decision, the Examiner expresses some misgivings about the effect such F. H. A. policies should have on this proceeding. (See I. D., p. 27) Consequently, it is reasonable to assume that the Examiner gave little or no consideration and credence to this evidence in reaching his Conclusions and Order.

Also, we feel that the F. H. A. evidence objected to herein is neither necessary essential, nor of any consequence to the ultimate disposition of this proceeding.

D. *As To Exceptions To The Failure Of The Hearing Examiner To Make Certain Findings*

Respondent herein is not excepting to the Hearing Examiner's failure to find facts proposed to him by Respondent. Rather, Respondent is excepting to the failure of the Examiner to find certain facts which were neither proposed to, nor requested of, the Examiner. Since the Examiner was not requested to make such findings, any exception to such a failure is a *non sequitur*. Exceptions should be addressed to Findings made or to the failure to act properly on appropriate requests. The Examiner cannot be put to the task of guessing which facts, within the interstices of a record, a party desires him to find. It is for this reason that appropriate procedures exist for the proposal of Findings to be submitted to the Examiner before he renders his Initial Decision. (See 45 C.F.R. 80.9 (d) (1) and (2); 5 A.P.A. Sec. 557 (c)(1); 45 C.F.R. 81.81 and 81.92)

Under these exceptions, we are being asked to make original findings based upon witnesses' testimony whose credibility was within the perception of the Examiner. For us to rule on these exceptions, we would have to rule as to the existence or nonexistence of such facts without the opportunity for a personal observation of the witnesses testifying thereto, a situation in which we are loath to indulge. Ordinarily, it is the Examiner who makes *initial* Findings or determinations and we rule only on the exceptions thereto, unless the record clearly indicates that some salient, overlooked, or omitted fact is indispensible to a proper and ultimate disposition of the proceeding. It

is in this sense that we assiduously endeavor to avoid "second guessing" the Examiner. For these reasons we deny Respondent's exceptions herein.

V. *Conclusion*

In view of our rulings above upholding the Findings of the Examiner that the educational necessity for the erection of the Grant School was dubious; that its student body was entirely all-black with the exception of one white student whose family subsequently moved out of the Grant School area; and it was staffed with a new all-black faculty; that all of the Grant area black elementary school children previously transferred from Ridgewood to the predominantly white Jefferson School in 1925 were again transferred from Jefferson to Grant in 1926, when they could have been educationally accommodated at Jefferson; that the nebulous, undefined attendance area of the Grant School appeared to be designed to insure that the black children in and around the Grant area would be assigned to the Grant School; that the Grant School was openly declared by the then Superintendent of the Respondent's District to be a "colored school"; and that Grant School was knowingly erected in partial conformance with the then existing and portentous segregation in residential housing patterns indicated by the presence of racially restrictive covenants in the Respondent's school district, we agree that the Grant School was established with a segregatory purpose.

Furthermore, our agreement with the Examiner of the continued assignment of only black students to the Grant School since its inception; of the continued assignment of an all-black, full-time classroom faculty at Grant until 1964; of the early reluctance to assign black faculty elsewhere in the system because of hostile racial attitudes regarding blacks teaching white children; of the failure of

the Respondent's School Board to alleviate the subsequent overcrowding at Grant in the Thirties by transferring Grant students elsewhere in the system where in fact other schools were operating under capacity; of the failure of the Board to alleviate overcrowding at Grant in the Forties by transferring Grant students to the available Jefferson School because of the hostile racial attitudes existing in the Jefferson area; of the acquisition by the District of a grant in the Forties from FWA to expand the Grant School in order to transfer the 7th and 8th grade black children from the Taft to the Grant School; and of the expressed racial attitudes and observations of Superintendent Down in the Forties regarding the administration and operation of the Respondent's school system, particularly with regard to the Grant School, all lead to a reasonable conclusion that the Respondent has purposefully maintained the Grant School as a segregated unit. Consequently, it cannot be said that the present racial identity of Grant as an all-black school is fortuitous or adventitious. The existence of a purpose to segregate constitutes an intent to segregate, and the resultant segregation becomes and is *de jure* segregation, for which the Respondent has the affirmative and positive responsibility to correct and amend *posthaste.*

The Respondent's neglect, failure, or refusal, to undo the effects and results of the past segregatory practices of its School Board is a violation of Title VI of the Civil Rights Act of 1964 and the Regulations promulgated pursuant thereto, and as such renders the Respondent in noncompliance therewith. So it is that we are constrained to affirm the Findings, Conclusions, and Order of the Hearing Examiner below, insofar as they are consistent with our rulings herein.

/s/ Oliver Morse, Member
Reviewing Authority (Civil Rights)
/s/ Irving Ferman, Member
Reviewing Authority (Civil Rights)

Specially Concurring Opinion

At the outset, it needs to be said that this appears to be a unique case in the area of school desegregation and is one of first impression for this Reviewing Authority. This view is reinforced by the statement of General Counsel (p. 37, Transcript Oral Argument) in response to the Hearing Examiner's query as to ". . . is there any authority in the Court of Appeals or the Supreme Court, that I must find that the School Board has the affirmative duty to mix up the children?" The General Counsel responded, "There is no authority for the proposition unless the segregation has occurred as a result of state action."

The writers of this portion of the opinion are of the impression that it is unnecessary to a decision to ascertain the motive and intent of the Respondent School Board in 1925-26. Generally, such an endeavor is an exercise in futility, and, especially, where, as in this case, it is unnecessary in order to reach a decision. As was stated in the case of *Hobson vs. Hansen,* 269 F. Supp. 401, 418, (1967):

> "The Court, however, is convinced, first, that whatever the trends in recent educational thought, in 1954 the Board of Education sincerely believed in the neighborhood school policy and the legitimate values they saw it as furthering. Accordingly, the Court cannot conclude that its segregatory potential was the reason the Board inaugurated the neighborhood policy 13 years ago. *Actually, the whole question of the Board's motives in 1954 spins in a kind of unreality.*" (Emphasis added)

The Notice of Opportunity for Hearing, in Paragraph 6, contains the following allegation:

"6. In 1965, Respondent School District submitted to the Department a written assurance (HEW Form 441) that it would comply with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the Regulation; and Respondent School District further gave assurance that it would immediately take any measures necessary to effectuate the aforementioned agreement."

The said Form 441 states, in part, that the applicant "HEREBY AGREES THAT it will comply with Title VI . . . to the end that, . . . no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant received Federal financial assistance from the Department: and HEREBY GIVES ASSURANCE THAT it *will immediately take any measures necessary to effectuate this agreement.*" (Emphasis added)

Given the facts of this case, i.e., an all-black school with a majority black faculty, the question is raised as to whether or not we have a racially identifiable school, either as to student body or faculty or both, as a result of discriminatory practices or failure to effectuate the agreement contained in H.E.W. Form 441 referred to above. This school, together with the obligations of Title VI and the Regulation, presents the Respondent School Board, pursuant to its execution of Form 441, with the duty to avoid pupil placement and/or faculty employment practices which lead to segregation by race. *When* the racial identifiability occurred is not a matter of great moment from the point of view of reaching this decision. Even if the Respondent had no obligation to correct such practices

in the past, it did, however, assume as affirmative obligation to avoid these practices by its execution of Form 441.

Again, referring to *Hobson, supra,* at page 497, it is noted:

> "The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions . . ., we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.
>
> ". . . Further, the inequality of a predominantly Negro school is most often no mere random fortuity unlikely to persist or recur, . . . It is instead just one more exemplification of a disheartening and seemingly inexorable principle: segregated Negro schools, however the segregation is caused, are demonstrably inferior in fact."

The writers of this concurring opinion, having considered the difficulties of ascertaining past motives and intent, and having expressed the opinion that such determination is unnecessary to this decision, agree that the total record of this proceeding is such that it enables the Reviewing Authority to affirm the initial decision and to make such rulings as two of our brethern felt compelled to do. Respondent's exhibits D-28, pages 2-3, and D-29, page 3, when considered with Government's exhibits D-45, pages 1, 2 and 3 and D-46, pages 1 and 2 are sufficient to

give rise to an inference of a segregatory purpose in the establishment and maintenance of Grant as an all-black school. Because we differ, in part, with our brethern in some of their responses to the Respondent's exceptions, we will now consider those exceptions only wherein there lies a difference of opinion.

3. Exception 3 to Finding 21.

This exception should be granted. With all due respect to our colleagues, we should not be about the business of assuming the meaning of "educational necessity". The Finding states that, "There was no educational necessity for the construction of the Grant School in 1926." We do not equate educational necessity with "something you cannot reasonably do without". The record indicates *some* "educational necessity" for the establishment of Grant School. Our brethern refer to it as "good educational reason". Such equivacation is pure balderdash. Why not hold that the Respondent used a racially neutral educational necessity as a valid purpose to serve as a vehicle for an outright segregatory purpose. In any event, the Hearing Examiner erred in finding "no educational necessity" and our brethern erred in sustaining such finding.

Our brethern also go too far in saying that "they could have been *educationally accommodated as well* at Jefferson". (Emphasis added) It can be inferred and deduced from the record that, physically, the Grant students could have been accommodated at Jefferson in 1926. However, there is no competent evidence upon which to base an inference that " they could have been *educationally accommodated as well* at Jefferson". (Emphasis added)

5. Exception 5 to Finding 25.

This exception should be granted only insofar as the Examiner characterizes segregation as the "primary pur-

pose" of the School Board in the establishment of the Grant School. From our previous discussion, it has already been stated that the segregation of black children was a purpose of the Grant School, but that such purpose was accompanied by concurrent racially neutral purposes or motives. This alone is sufficient to support the finding of noncompliance. Due to the lack of specific, overwhelming evidence, we cannot agree that the segregation of black pupils was the primary purpose in the establishment of Grant School. The most that can be said is that it may have been as compelling as the educational purpose or purposes.

Also, we must take issue with our brethern's reference to a "discernible boundary" around the Grant area. Our review of the record does not find that such a "discernible boundary" due to "racial covenants, known to the Board" existed at the time the Grant decision was made. In fact, there is much room for doubt that any such clearly "discernible boundary" ever come about because of racial covenants.

12. Exception 12 to Finding 32.

We differ with our brethern only as this Finding deals with "primarily race" and specifically adopt our discussion of exception 5 to Finding 25 as it relates to "primary purpose".

14. Exception 14 to Finding 34.

See our discussion of Exception 5 to Finding 25 as it deals with "discernible boundaries" and "racial covenants, known to the Board."

15. Exception 15 to Finding 35.

See our discussion of exception 5 to Finding 25 and exception 12 to Finding 32. It has been stated that there

was a segregatory purpose. As indicated above, it did not need to be the primary purpose in order to inculpate the system.

43. Exception 43 to Finding 95.

For the sake of consistency and clarity, see our discussions above regarding Findings 21, 25, 32, and 35.

44. Exception 44 to Conclusion 4.

For the sake of consistency and clarity, see our discussions above regarding Findings 25, 32, and 35.

48. Exception 48 to Conclusion 9.

For the sake of consistency and clarity, see our discussions above regarding Findings 21, 25, 32, and 35.

54. Exception 54 to Conclusion 15.

For the sake of consistency and clarity, see our discussion above regarding Finding 25.

56. Exception 56 to Conclusion 17.

For the sake of clarity and consistency, see, see our discussions above regarding Findings 21, 25, 32, and 35.

/s/ Edward A. Potts Chairman
Reviewing Authority (Civil Rights)
/s/ William F. Able, Member
Reviewing Authority (Civil Rights)

Order

Finally, in view of what has been said above, we, the Reviewing Authority, hereby adopt, and include by reference as its final decision, the Initial Decision in this proceeding insofar as it is consistent with our rulings above. In addition, we also amend the Examiner's Order to further include a refusal to grant Federal financial assistance for which the Resondent may be eligible but has not yet applied so as to encompass a prospective bar to all future Federal assistance administered by the Department of Health, Education, and Welfare, so long as the Respondent remains in noncompliance.

/s/ Edward A. Potts, Chairman
/s/ Oliver Morse, Member
/s/ Irving Ferman, Member
Reviewing Authority (Civil Rights)

Dissenting Opinion

I respectfully dissent from the opinion of my learned brethern as to Exception 57 to Conclusion 19. I would grant, in part, Respondent's Exception to this Conclusion. Although programs, or parts thereof, are racially identifiable, the junior and senior high schools and programs therein are neither conducted in a non-discriminatory manner or the Department of Health, Education and Welfare failed to carry the burden of proof and present evidence of their discriminatory operation.

Although the record indicates the status of the Grant School and thus the infection of the elementary schools, the junior and senior high schools are desegrated. Nothing

in the record challenges the desegregated operation of the junior and senior high schools. In fact, the General Counsel, in his "Response to Respondent's Exceptions to the Initial Decision" at page 21 stated:

> "In concluding, we must concede that termination of Respondent's Federal assistance is bottomed upon the existence of illegal student and/or faculty segregation at the Grant School; and should the Reviewing Authority find illegal segregation to be lacking, then there would be no basis for such termination."

Therefore, under the theory of severability which this writer expressed in the dissenting opinion in *Jasper Independent School District,* CR-774, September 22, 1970, all aspects of the junior and senior high schools, including the Guidance and Vocational Education programs, should be excluded from the termination order.

I concur in the exclusion of the Adult Basic Education program. For a more detailed discussion of the reasons for excluding programs or parts thereof from termination orders, see the dissenting opinion in *Jasper, supra*

/s/ William F. Able, Member
Reviewing Authority (Civil Rights)

Certificate of Service

I hereby certify that I caused one copy of the attached document to be mailed this date to the following persons at the addresses given:

Superintendent School District of the City of
Ferndale
130 East Nine Mile Road
Ferndale, Michigan 48220

Superintendent of Public Instruction
State Department of Education
Lansing, Michigan 48902

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1800 G Street N.W., Room 512
Washington, D. C. 20550

Hearing Clerk
HEW North Building, Room 4519
330 Independence Avenue, S.W.
Washington D.C. 20202

/s/ Margaret B. Seymour
Hearing Clerk
Reviewing Authority (Civil Rights)
330 Independence Avenue, S.W.
Room 4519, HEW North Building
Washington, D.C. 20202

Docket No. CR-866
Date: September 29, 1971

ORDER OF THE SECRETARY

Administrative Proceeding

In The
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

National Science Foundation

In the Matter of: State Department of Education of Michigan (hereinafter called "School District") and State Department of Education of Michigan (hereinafter called "State Agency"), Respondents.	Docket No. CR-866

The School District of the City of Ferndale, Michigan, petitions for Secretarial review of the rulings and order of the Reviewing Authority (Civil Rights). The Reviewing Authority denied most, although not all, of the School District's exceptions to a hearing examiner's findings of fact and conclusions of law, and entered an order excluding the School District from further Federal financial assistance until it comes into compliance with Title VI of the Civil Rights Act of 1964.

Secretarial review under 45 C.F.R. sec. 80.10(e) is discretionary and will not be granted unless there are "special and important reasons thereof." Past decisions by Secretaries of Health, Education, and Welfare establish that contentions based on disputed issues of fact are not sufficient to warrant Secretarial review. In re The School

Board of the City of Newport News, No. CR-669 (July 1, 1971); In re Clinton City Board of Education, No. CR-529 (May 26, 1969). The arguments presented here fail to satisfy the standards set by those cases.

The School District does make one point, however, requiring brief comment. The District's request for oral argument before the Reviewing Authority was never answered save by the ultimate decision against the District. Since the granting of such oral argument is entirely within the Reviewing Authority's discretion and since the written submissions to the Reviewing Authority were more than adequate, I do not believe that the Reviewing Authority's failure to deal explicitly with this point warrants Secretarial review. Unquestionably, however, it would be the better practice for the Reviewing Authority to address such requests in its opinions and orders.

The petition for oral argument is denied. The petition for review is also denied.

/s/ Elliot Richardson
Secretary

Date
4/18/72

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

Washington, D.C. 20201

May 22, 1972

Burton R. Shifman, Esquire
Colman, Goodman & Shifman
707 Northland Towers East
Southfield, Michigan 48075

Dear Mr. Shifman:

I have reviewed the request, made in your letter of May 17, 1972, on behalf of the School District of the City of Ferndale, Michigan, that I stay the effect of this Department's order terminating federal financial assistance to the School District pending judicial review of that order.

You enclosed with your letter a copy of a petition for review, which you say has already been sent to the United States Court of Appeals for the Sixth Circuit.

In order that the School District may have an opportunity to perfect its petition for judicial review and to apply to the Court of Appeals for further stay of this Department's order if the District decides that it should seek such further stay I will delay the effect of the termination order entered on April 19, 1972, against the School District of the City of Ferndale for an additional period of 30 days. Accordingly, the order of termination will become effective on June 18, 1972.

With kindest regards,

Sincerely,

/s/ Elliot Richardson
Secretary

ORDER

(Filed March 1, 1973)

No. 72-1512

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

School District of the City of Ferndale, Michigan,
Petitioner,
vs.
Department of Health, Education and Welfare,
Respondent.

Before: Weick and Edwards, Circuit Judge and Wilson,* District Judge.

On consideration of the lengthy record in this protracted dispute, we find substantial evidence to uphold the order of the Department of Health, Education and Welfare based upon findings that the Ferndale School District is being operated in violation of Title 6 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1970);

WHEREFORE, the order of the Department of Health, Education and Welfare appealed from is affirmed and the sequestration previously entered in this case is vacated.

Entered by order of the Court

/s/ James A. Higgins
Clerk

* Honorable Frank W. Wilson, Chief Judge United States District Court for the Eastern District of Tennessee, sitting by designation.

No. 72-1512

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
APR 2 - 1973
JAMES A. HIGGINS, Clerk

SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN,

Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Respondent.

ORDER

Before: WEICK and EDWARDS, Circuit Judges, and WILSON,* District Judge,

On receipt and consideration of the petition for rehearing filed in the above-styled case; and

Noting no material presented therein which had not previously been fully considered by the court;

Said motion for rehearing is hereby denied.

Entered by order of the court

Clerk

* Honorable Frank W. Wilson, Chief Judge, U. S. District Court for the Eastern District of Tennessee, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1541

SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN, PETITIONER

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The General Counsel of the Department of Health, Education, and Welfare instituted administrative proceedings in 1969 to determine whether petitioner, which was then receiving federal financial assistance, was causing black school children to be subjected to discrimination in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. The hearing examiner found that petitioner had purposely established and maintained unlawful racial segregation in its schools, and he ordered the termination of federal financial assistance to petitioner until it complies with the relevant federal legal requirements (Pet. App. 1a-52a).[1] This

[1] The order excepted federal financial assistance for petitioner's adult education programs (Pet. App. 48a-50a).

decision was adopted, with minor modifications and amendments, by the Department's four-man Reviewing Authority (Pet. App. 53a-94a), and the Secretary denied petitioner's request for futher administrative review (Pet. App. 95a-96a). The court of appeals affirmed the administrative order *per curiam* (Pet. App. 98a).

Petitioner, by characterizing this case as involving a racially neutral system of pupil assignments to neighborhood schools, in effect contends that the administrative findings and order were not supported by substantial evidence. The hearing examiner expressly found that petitioner had discriminated among students and faculties on the basis of race (Pet. App. 4a-5a):

> * * * The weight of the evidence requires the findings * * * that the School Board established * * * a separate school for Negro children for the purpose of segregating the Negro children in the Grant area from the white children in its elementary schools; that it continued to maintain the school with an all-black student body for that purpose; and that it assigned a segregated teaching faculty to the school for many years in accordance with a purpose to discriminate * * * ; that the School Board's course of conduct for forty-four years has been consistently one of segregating the Negro children residing in the Grant area and the Township, from the Ferndale City elementary schools.

This broad finding of discrimination was based on numerous findings of specific actions by petitioner designed to establish or maintain racial segregation (see Findings of Fact Nos. 14-67, Pet. App. 27a-34a). The court of appeals reviewed the extensive record on which these findings were based and expressly upheld

them as supported by substantial evidence (Pet. App. 98a). This evidentiary issue warrants no further review.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

---

[2] Petitioner also asserts that the hearing examiner erred in admitting evidence of racial discrimination by other persons. The hearing examiner ruled that evidence of racial discrimination by local governmental agencies and private persons was properly admissible to show that "the residential segregation and the school segregation each supported the other" (Pet. App. 5a). Moreover, the hearing examiner explicitly refused to find that petitioner's reliance on the concept of neighborhood schools, in conjunction with residential segregation, constituted *de jure* school segregation (Pet. App. 5a, 20a-23a). Thus the Reviewing Authority, in considering petitioner's objections to the evidence as irrelevant, concluded that any error was harmless since much of the evidence of third-party racial discrimination was of no "consequence to the ultimate disposition of this proceeding" (Pet. App. 80a, 82a) and the remainder had been properly admitted for the narrow purpose of showing petitioner's intentional reinforcement of such third-party discrimination.

FILE COPY

Supreme Court, U. S.
FILED
DEC 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1541

SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN
Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1541

SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN
Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REASONS FOR GRANTING THE PETITION

The events which have occurred subsequent to the denial of Petitioner's petition for writ of certiorari, mandate that this Court now grant the petition for writ of certiorari. The Court in *Keyes* v *School District No 1,* 413 U.S. ....., 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973) set down tests and guidelines in cases where segregation is not compelled or authorized by statute, and the hearing examiner and the

Court of Appeals acted contrary to these tests and guidelines in deciding the instant case. Four members of this Honorable Court felt that *Keyes, supra,* was significant enough to warrant the granting of a petition for writ of certiorari in *Cisneros* v *Corpus Christi Independent School District,* No 72-649, 37 L. Ed. 2d 1044 (1973). The injustice of the lower court's decision and the national significance of the instant case are far greater than in *Cisneros, supra.*

The order appealed from cuts off all federal funds including those to the integrated junior high school and high school and those designated for low income families until Petitioner takes some unspecified action to rectify an allegedly illegal situation which it did not create. This Court, by granting the petition for writ of certiorari, can remedy this inequitable decision while establishing guidelines for future H.E.W. cases and cases involving small suburban school districts where the alleged school segregation is a consequence of other types of state action without any discriminatory action by school authorities.

Despite alleged imperfections, Ferndale is one of the few racially integrated school districts in the Detroit suburbs. By virtue of Respondent's action, federal funds which continue to flow to districts which are not integrated, are being withheld from Petitioner. Surely, those districts which have no black students cannot suffer a loss of federal funding because of "imperfect integration", yet Ferndale incurs such a loss because of demographic circumstances occurring 48 years ago.

I.

THE EFFECT OF THE DECISION IN KEYES v. SCHOOL DISTRICT NO. 1.

While there are obvious distinctions between the Denver school district and the Ferndale school district, there are similarities which make the decision and rationale of *Keyes, supra* relevant to the instant case. Both systems have never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education. In both there was one segment of the school district which was alleged to be segregated raising the issue of whether that one segment made the entire school district segregated. The Ferndale school district is substantially less segregated since only one elementary school out of a total of ten is alleged to be illegally segregated, since the junior high school and high school are fully integrated, and since every child in Ferndale receives at least six years of fully integrated education. In addition, the conduct of the Denver school board in connection with the segregated area (Park Hill) was determined to have been the cause of the segregation while in the Ferndale district the primary evidence regarding the racial composition of the Grant School was directed to the conduct of agencies and individuals other than the Ferndale school board.

The Court in *Keyes, supra* stated that the plaintiffs in a civil rights action must first show a racially discriminatory purpose on the part of the school board as to a significant or meaningful portion of a school system and secondly, that there was a causal relationship between the acts and the racial imbalance which resulted. It is obvious that had the hearing examiner or the Court of Appeals applied the standards set forth in *Keyes, supra,* the ruling

would have been favorable to Petitioner. The composition of Grant School was determined by a neighborhood school plan adopted in 1921, more than five years before the Grant School was built in 1926. Almost all of the evidence introduced by Respondent to rebut this fact was directed to the actions of entities other than the School Board. Despite disclaimers by the hearing examiner that testimony with regard to FHA policies (long since abandoned), restrictive covenants (invalid for over 25 years), private real estate practices and governmental zoning policies were not the controlling reasons for his decision, it is obvious he relied heavily on this evidence. There was no substantial evidence that the school board had done anything other than follow and implement a neighborhood school plan adopted five years prior to the construction of Grant School at a time when there was no meaningful concentration of black children. Justice Powell, in his concurring opinion in *Keyes,* 37 L. Ed. 2d at page 573, defines an integrated system and sets forth the duties and obligations of the school board in connection therewith. It appears that the Ferndale school board is complying with these duties and obligations. As Justice Powell states, an integrated system does not mean that *every school* must, in fact, be an integrated institution. Since there is no substantial evidence of a racially discriminatory purpose on the part of Petitioner, and since the alleged segregation does not encompass a significant portion of the school system, Respondent has failed to meet the first test set forth in *Keyes, supra.*

The causal relationship between the alleged illegal acts of the school board and the racial imbalance was not even considered by the hearing examiner. There is no finding of fact or conclusion of law that a lesser degree of segregation would have occurred in the school district had the school board not acted as it did. The Court stated in *Keyes, supra:*

> "This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did. In Swann, we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." 37 L. Ed 2d at 574.

There was no finding of fact or conclusion of law regarding this issue because there was no evidence which would have supported such a finding. This crucial omission justifies a reversal of the hearing examiner's decision, or at the very least, that the case be remanded for further consideration.

II.

THE REMEDY DECREED BY THE HEARING EXAMINER IS CONTRARY TO LAW AND EQUITY.

The entire Ferndale school district has been denied all Federal funds including the right to apply for such funds in the future. This cut off applies to the primary and secondary schools as well as to programs which were designed to benefit low income families.

The inequity of penalizing the children who attend the single junior high school and high school because of the alleged segregation in one of the ten elementary schools was recognized by one of the members of the H.E.W. Reviewing Authority. (Dissenting opinion, William F. Able, Member, Reviewing Authority). (Appendix pp. 91a-92a.) Even the hearing examiner recognized that he could

not cut off funds to the secondary schools without concluding that these completely integrated schools were somehow operated in a discriminatory manner. So without a single finding of fact or a scintilla of evidence to support such a conclusion, he makes a conclusion of law that,

> "The existence of the illegal segregation of students and faculty in the elementary schools of the District so infects the rest of the system as to render discriminatory all aspects of the operation of Respondent School District's system of elementary and secondary instruction . . ." Hearing Examiner's Conclusions of Law, Number 19, Appendix, p 47a.

In addition to the harshness of the remedy, absolutely no guidelines are set forth as to what Petitioner must do in order to again obtain Federal funds. The school district could have to bus children from the Grant School into every other school and bus children from every other elementary school into Grant so that the ratio of minority students in each school is equal to the ratio of minority students in the entire school district, and this might be only the beginning of the reshuffling required. This Court stated in *Swann,*

> "The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes

> beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination . . ." 402 U.S. at 22-23.

In his concurring opinion in *Keyes, supra* Justice Powell stated,

> "With most constitutional violations, the major burden of remedial action falls on offending state officials. Public officials who act to infringe personal rights of speech, voting, or religious exercise, for example, are obliged to cease the offending act or practice and, where necessary, institute corrective measures. It is they who bear the brunt of remedial action, though other citizens will to varying degrees feel its effects. School authorities responsible for segregation must, at the very minimum, discontinue segregatory acts. But when the obligation further extends to the transportation of students, the full burden of the affirmative remedial action is borne by children and parents who did not participate in any constitutional violation." 37 L. Ed. 2d at 586-87.

This is the situation in the Ferndale school district. The Department of Health, Education and Welfare is withholding funds from an integrated high school, from an integrated junior high school, and from those children that Congress has determined are entitled to the funds necessary to enable them to benefit from a public school education.

Any efforts by Petitioner to comply with the hearing examiner's vague order will, at the very minimum, require young children to attend schools further from their homes than they are now attending. No other school children in the metropolitan Detroit area are presently required to

do that. There is now pending in this Court the case of *Bradley* v *Milliken,* No. 73-424, dealing with the issue of school desegregation in the metropolitan Detroit area. It is highly probable since Ferndale has been made a part of a metropolitan Detroit desegregation plan by the *Bradley* case, that Petitioner might be required by H.E.W. to do certain things to comply with its Order, and something entirely different once this Court has decided the *Bradley* case.

III.

THE INSTANT CASE IS ONE WITH GREAT NATIONAL SIGNIFICANCE.

This Court has decided cases from areas where segregation had been mandated by legislation and from large Northern metropolises. This case is the first in what could be many involving suburban school districts with the typical pyramid system of a number of grade schools culminating in one or two junior high schools and a single high school, and the first of what will likely be many cases instituted by the Department of Health, Education & Welfare. There is a vital need for this Court to set standards in these cases as to what constitutes a violation of the act, and what a school district must do to comply with the act. There is nothing in the act, there are no regulations and no one has been able to give any definite answers. In addition, this is a case involving the issue of school segregation as a consequence of other types of state action, without discriminatory action by school authorities. As the Court stated in *Swann,*

> ". . . We do not reach in this case the question of whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities,

is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it." 402 U.S. at 22-23.

In a case where a substantial wrong has been done and where so many questions as yet unresolved by this Court are in issue, this Court should grant Petitioner's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

In the Supreme Court of the United States

School District of the City of Ferndale, Michigan Petitioner, v Department of Health, Education and Welfare, Respondent.	No 72-1541

State of Michigan,
County of Oakland—ss.

Burton R. Shifman, being duly sworn, deposes and says:

1. That he is the attorney for the School District of the City of Ferndale, Michigan, Petitioner in the above

entitled cause, and makes this Certificate of Counsel in accordance with Rule 58 of the Rules of the Supreme Court of the United States.

2. That the Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, being filed herewith, is presented in good faith and not for purposes of delay, and that said Petition for Rehearing is restricted to grounds of intervening circumstances of a substantial and controlling effect upon the instant case, as set forth in said Petition for Rehearing.

Further, deponent sayeth not.

/s/ BURTON R. SHIFMAN

Subscribed and sworn to before me this 21st day of December, 1973.

/s/ Philip J. Goodman
Notary Public
Oakland County, Michigan
My Commission expires:
June 8, 1977